92-933

Supreme Court, U.S.
FILED
DEC 1 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1992

SETH WARD,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MADISON GUARANTY SAVINGS AND LOAN ASSOCIATION, and MADISON FINANCIAL CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS RAY
SHULTS, RAY & KURRUS
200 W. Capitol, Suite 1600
Little Rock, AR 72201-3637
(501) 375-2301

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

107 pp

QUESTIONS PRESENTED FOR REVIEW

On September 25, 1989, the respondent Resolution Trust Corporation (the "RTC") removed this case from the Arkansas Court of Appeals to federal district court. Immediately thereafter, the RTC voluntarily returned to the Arkansas Court of Appeals, reinvoked that court's jurisdiction by petitioning it for affirmative relief, and, later, filed a brief requesting it to determine the issue of its subject matter jurisdiction over the removed proceeding. The Arkansas Court of Appeals decided that it had subject matter jurisdiction and, on October 25, 1989, entered a *per curiam* order and mandate dismissing the RTC's appeal of the underlying state court judgment in favor of petitioner Seth Ward ("Ward"). *See*, appendix hereto, at 35a-37a. The RTC did not pursue any further direct appeal of that *per curiam* order and mandate. Instead, over one year later, the RTC collaterally attacked the state court's decision in federal district court by asserting for the first time a *D'Oench* defense to Ward's now final, fully satisfied state court judgment. The district court held that the Arkansas Court of Appeals' mandate was entitled to *res judicata* effect and that the RTC was barred from proceeding further. The Eighth Circuit, in reversing and remanding, held that the Arkansas Court of Appeals' mandate was "void" and that the RTC could continue with its prosecution of this matter in federal court.

The following questions are presented:

1. Whether the Arkansas Court of Appeals' October 25, 1989 mandate dismissing the

QUESTIONS PRESENTED FOR REVIEW – Continued

RTC's appeal of the underlying state court judgment is entitled to *res judicata* effect?

2. Whether the RTC's failure to pursue a direct appeal of the October 25, 1989 mandate to the Arkansas Supreme Court and, if necessary, to this Court bars it from later collaterally attacking that mandate in federal district court?

3. Whether the RTC can assert its *D'Oench* and Section 1823(e) defenses for the first time in a post-judgment appeal and, if so, under what circumstances?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Seth Ward and the respondents Resolution Trust Corporation, as Receiver for Madison Guaranty Savings and Loan Association, and Madison Financial Corporation, a wholly owned subsidiary of Madison Guaranty Savings and Loan Association.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND RULES INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 13

I. The Eighth Circuit's decision to apply *res judicata* only to those state court adjudications of subject matter jurisdiction which are "correct," rather than "fair," conflicts with decisions of this Court and other Circuits 13

II. The Eighth Circuit's decision to allow the RTC to collaterally attack the Arkansas Court of Appeals' October 25, 1989 mandate, after abandoning its direct appellate remedies for challenging that decision, conflicts with decisions of this Court and other Circuits 18

III. The Eighth Circuit's decision to allow the RTC to assert its *D'Oench* and 12 U.S.C. § 1823(e) defenses for the first time in a post-judgment appeal conflicts with decisions of other Circuits 22

CONCLUSION 26

APPENDIX 1a

Opinion of the Eighth Circuit Court of Appeals 1a

Judgment of the district court 7a

TABLE OF CONTENTS – Continued

Page

Eighth Circuit's September 3, 1992 order denying Ward's petition for rehearing 13a

Ward's September 6, 1988 state court judgment ... 14a

Escrow Agreement among Ward, Madison Guaranty and Worthen Bank..... 17a

RTC's September 25, 1989 notice of removal 22a

RTC's September 25, 1989 motion for release of original record filed with Arkansas Court of Appeals..... 26a

RTC's October 13, 1989 brief arguing that the Arkansas Court of Appeals should adjudicate the issue of subject matter jurisdiction over the removed proceeding..... 29a

Arkansas Court of Appeals' October 25, 1989 *per curiam* order and mandate dismissing the appeal 35a

RTC's October 30, 1989 emergency motion for injunctive relief filed in federal district court 38a

Federal district court's October 31, 1989 ruling from the bench refusing to enjoin the Arkansas Court of Appeals or to vacate its October 25, 1989 mandate 44a

RTC's November 13, 1989 petition to reconsider or to recall mandate filed with the Arkansas Court of Appeals..... 52a

Ward's November 17, 1989 response in opposition to petition for rehearing 60a

Arkansas Court of Appeals' November 29, 1989 order denying RTC's petition to reconsider or recall the October 25, 1989 mandate 70a

TABLE OF AUTHORITIES

Page

Ackerman v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) 19

Alleghany Corporation v. Kirby, 340 F.2d 311 (2nd Cir. 1965) 20

Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947) 20, 21

Baumann v. Savers Fed. Sav. & Loan Ass'n., 934 F.2d 1506 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1936 (1992) 23, 24

Connor v. Real Title Corporation, 165 F.2d 291 (4th Cir. 1947) 20

Dillon v. RTC, as Conservator for Madison Guar. Sav. & Loan Ass'n, 306 Ark. 172, 811 S.W.2d 765 (1991) 13

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1992) .*passim*

Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) 15, 16, 17

FDIC v. Hadid, 947 F.2d 1153 (4th Cir. 1991) 22, 25

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) .. 19, 21, 22

Fidelity Standard Life Insurance Co. v. First Natl. Bank & Trust Co., 510 F.2d 272 (5th Cir. 1975) 17

FSLIC v. Westgate Partners Ltd., 726 F.Supp. 807 (D. Colo. 1989) 14

Grubb v. FDIC, 833 F.2d 222 (10th Cir. 1987) .. 22, 23, 25

In re 604 Columbus Ave. Realty Trust, 968 F.2d 1332 (1st Cir. 1992) 23, 24

In re FSLIC, 881 F.2d 564 (8th Cir. 1989) 7

TABLE OF AUTHORITIES – Continued

Page

In re RTC, 888 F.2d 57 (8th Cir. 1989) 9

Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) 16

Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940) 16

Kremer v. Chemical Construction Corporation, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) 16

Larsen v. FDIC/Manager Fund, 835 S.W.2d 66 (Tex. S.Ct. 1992) 22, 25

N.W. Land v. New West Fed. Sav. & Loan, 827 P.2d 334 (Wash. Ct. App. 1992) 22, 25

Olney Savings & Loan Ass'n v. Trinity Banc Savings Ass'n, 885 F.2d 266 (5th Cir. 1989) 22, 23, 25

Reed v. Allen, 286 U.S. 191, 52 S.Ct. 523, 76 L.Ed. 1054 (1932) 19

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) 20, 22

RTC v. Key, 733 F.Supp. 1086 (N.D. Tex. 1990) 14

Schroeder v. 171.174 Acres of Land, 318 F.2d 311 (8th Cir. 1963) 15

Steamship Co. v. Tugman, 106 U.S. 118 (1882) 20, 21

Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938) 15

Thurman v. FDIC, 889 F.2d 1441 (5th Cir. 1989) 22, 25

Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939) 15

TABLE OF AUTHORITIES – Continued

Page

Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n., 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed. 558 (1982) ...14, 17

U.S. v. United States Fidelity and Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) 16

Ward v. RTC, 901 F.2d 694 (8th Cir. 1990) 11

Ward v. RTC, 972 F.2d 196 (8th Cir. 1992) 2, 12, 23

STATUTES

12 U.S.C. § 1441(b)(4) 4

12 U.S.C. § 1441a(*l*)(1) and (3) 2, 3, 7, 13, 14

12 U.S.C. § 1730(k)(1)..... 6, 7, 11

12 U.S.C. § 1821(d)(13) 4

12 U.S.C. § 1823(e) 2, 11, 12, 22, 23, 24, 25

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1292(a) 10, 18

28 U.S.C. § 1446..... 8, 13, 14

28 U.S.C. § 1447..... 7

28 U.S.C. § 1449..... 8

28 U.S.C. § 1738.....4, 14

28 U.S.C. § 2283.....5, 8

U.S. Constitution, Art. IV, § 1..... 14

No. _____

In The

Supreme Court of the United States

October Term, 1992

SETH WARD,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MADISON GUARANTY SAVINGS AND LOAN ASSOCIATION, and MADISON FINANCIAL CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner Seth Ward respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on July 30, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 972 F.2d 196, and is reprinted in the appendix hereto, at 1a-6a.

The judgment of the United States District Court for the Eastern District of Arkansas (Reasoner, D.J.), which incorporates its ruling from the bench, has not been reported. Both the judgment and the ruling from the bench are reprinted in the appendix hereto, at 7a-12a.

JURISDICTION

The RTC invoked federal jurisdiction under 12 U.S.C. § 1441a(*l*)(1) and (3) and removed this case from the Arkansas Court of Appeals to the United States District Court for the Eastern District of Arkansas (the "district court"). Based on subsequent proceedings before the Arkansas Court of Appeals, the district court entered a judgment holding that *res judicata* barred the RTC from collaterally attacking Ward's final, fully satisfied state court judgment and that the RTC's motion for relief from that judgment should be denied.

On the RTC's appeal, the Eighth Circuit reversed the district court's judgment and remanded the case for consideration of the RTC's newly raised *D'Oench* and 12 U.S.C. § 1823(e) defenses and Ward's contention that those defenses do not apply. On September 3, 1992, the Eighth Circuit entered an order denying Ward's petition for rehearing, along with his suggestion for rehearing *en*

banc. This order is reprinted in the appendix hereto, at 13a.

Ward has filed this petition for writ of certiorari within ninety (90) days of the date of the Eighth Circuit's September 3, 1992 order. The jurisdiction of this Court to review the decision of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

12 U.S.C. § 1441a(*l*). Power to remove; jurisdiction

(1) In general

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation [the RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

* * *

(3) Removal and remand

> The Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit, or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the

district where the institution's principal business is located.

12 U.S.C. § 1441a(b)(4). Conservatorship, receivership, and assistance powers

(A) In general

Except as provided in paragraph (5) and in addition to any other provision of this section, the Corporation shall have the same powers and rights to carry out its duties with respect to institutions described in paragraph (3)(A) as the Federal Deposit Insurance Corporation has under . . . 12 U.S.C. § 1821. . . .

12 U.S.C. § 1821(d)(13). Powers and duties of the Corporation as conservator or receiver

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

28 U.S.C. § 1738. State judicial proceedings; full faith and credit

* * *

Such Acts, records and judicial proceedings [of any state court] . . . so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 2283. Stay of State court proceeding

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

On September 2, 1987, Ward initiated this action against Madison Guaranty Savings and Loan Association ("Madison Guaranty") and Madison Financial Corporation ("MFC") in the circuit court of Pulaski County, Arkansas. Ward's claims against Madison Guaranty and MFC were based on their breach of a written real estate commissions contract. [App. 34:6-35:24; 188-189][1]

After a two-day jury trial, counsel for Madison Guaranty and MFC stipulated on the record that "MFC acts as an alter ego of Madison Guaranty and that Madison Guaranty would be liable if MFC was liable." [Supp. App. 97:7-12][2] Subsequently, without any objections, the trial court instructed the jury that "all parties to the case

---

[1] All references herein to appellant RTC's appendix filed with the Eighth Circuit appear as "App." All references herein to appellee Ward's supplemental appendix filed with the Eighth Circuit appear as "Supp. App."

[2] All references herein to oral trial proceedings before the state court include "App." or "Supp.App." followed by the page number and line number. Thus, "Supp. App. 97:7-12" means appellee Ward's supplemental appendix at page 97, lines 7 through 12.

agree that a contract between Seth Ward and Madison Guaranty Companies was agreed to" but that a dispute exists on the amount of the payments due Ward under that contract. [Supp. App. 98:16-99:12; App. 56:19-24]

On September 6, 1988, the trial court, consistent with the jury's verdict in favor of Ward, entered a $353,502.57 judgment against Madison Guaranty and MFC. This judgment is reprinted in the appendix hereto, at 14a.

Madison Guaranty and MFC filed a notice of appeal of that judgment to the Arkansas Court of Appeals. Shortly thereafter, Madison Guaranty and Ward entered into an escrow agreement pursuant to which Madison Guaranty deposited $400,000 into an escrow account at Worthen Bank & Trust Company ("Worthen") to secure its payment of Ward's judgment. As part of this arrangement, Ward agreed to halt his efforts to execute on the judgment pending dismissal, affirmance, or other resolution of the appeal. The escrow agreement is reprinted in the appendix hereto, at 17a. Among other things, paragraph 3 of the escrow agreement provided that: "Upon notice . . . that the Appeal for any cause has been dismissed, the Escrow Agent [Worthen] shall pay Seth Ward from the Escrow Fund . . . the full amount of the judgment . . . together with accrued interest and attorneys' fees. . . . "

On March 2, 1989, the FHLBB declared Madison Guaranty insolvent and FSLIC was appointed its receiver. On March 10, 1989, FSLIC filed a notice of removal which cited 12 U.S.C. § 1730(k)(1) as authority for removing the appeal from the Arkansas Court of Appeals to the district court. [Supp. App. 6-8]

On May 30, 1989, the district court entered an order remanding the case to the Arkansas Court of Appeals. After appealing that order of remand to the Eighth Circuit, FSLIC obtained from the Arkansas Court of Appeals three consecutive extensions of time to file its abstract and brief. However, in granting FSLIC's third requested extension, the Arkansas Court of Appeals made it clear that no more extensions would be allowed and that FSLIC must file its abstract and brief by September 29, 1989. [Supp. App. 12]

On August 7, 1989, the Eighth Circuit dismissed FSLIC's appeal of the district court's order of remand on the ground that 28 U.S.C. § 1447 proscribed appellate review of such orders, even when a case had been removed to federal court pursuant to a special removal statute such as 12 U.S.C. § 1730(k)(1). *In re FSLIC*, 881 F.2d 564 (8th Cir. 1989).

Two days later, FIRREA was enacted into law and the RTC filed a timely petition for rehearing. In this petition, the RTC argued that FIRREA authorized the Eighth Circuit to review the district court's order of remand and that this legislation should be given retroactive application.

On September 25, 1989, while its petition for rehearing was still pending and only four days before the final deadline for filing its abstract and brief with the Arkansas Court of Appeals, the RTC removed this case to the district court pursuant to the new removal provision contained in FIRREA, 12 U.S.C. § 1441a(*l*)(3). The RTC's September 25, 1989 notice of removal is reprinted in the appendix hereto, at 22a.

Immediately thereafter, the RTC *voluntarily returned* to the Arkansas Court of Appeals and reinvoked that court's jurisdiction by filing a motion requesting it to release the original record so that it could be filed with the district court.[3] This motion is reprinted in the appendix hereto, at 26a. Ward responded by filing a brief opposing the release of the original record, along with a separate motion to dismiss the appeal based on the RTC's failure to file its abstract and brief by the September 29 deadline previously fixed by the Arkansas Court of Appeals.

If the RTC wanted to preserve its federal forum and to avoid the state appellate court adjudicating the issue of subject matter jurisdiction in deciding Ward's motion to dismiss, there were two well established options available to it. First, the RTC could have petitioned the district court to issue an injunction pursuant to 28 U.S.C. § 2283, staying the proceeding before the Arkansas Court of Appeals. Second, the RTC could have petitioned the

---

[3] The general removal statutes make it clear that to effect removal, a party must file only a *copy* of the state court record, along with the notice of removal. 28 U.S.C. § 1446(a). Furthermore, 28 U.S.C. § 1449 provides that a removing party should petition the district court--not the state court from which the proceeding was removed—for an order directing the clerk to supply the record. The RTC had already filed a *copy* of the record along with its September 25, 1989 notice of removal. Therefore, the only plausible explanation for the RTC's attempting to obtain the release of the original record was to make it procedurally impossible for Ward to return the case to the state court forum if he later succeeded in getting the district court to enter another order of remand.

Arkansas Court of Appeals *not* to rule on Ward's motion to dismiss because the proceeding had been removed to federal court. However, instead of pursuing one of those options, on October 13, 1989, the RTC decided to take its chances in the state court by filing a response to Ward's motion to dismiss which requested the Arkansas Court of Appeals to *deny* Ward's motion *on the merits* and, in the process of doing so, to adjudicate the issue of the state court's subject matter jurisdiction over the case. The RTC's response to Ward's motion to dismiss is reprinted in the appendix hereto, at 29a.

On October 20, 1989, the Eighth Circuit granted the RTC's petition for rehearing on the merits of the district court's April 28, 1989 order of remand. *In re RTC*, 888 F.2d 57 (8th Cir. 1989). In doing so, the court held that orders of remand were reviewable under FIRREA, and that FIRREA should be given retroactive effect.

On October 25, 1989, the Arkansas Court of Appeals entered a *per curiam* order and mandate that denied the RTC's motion to release the original record and granted Ward's motion to dismiss the appeal. This *per curiam* order and mandate are reprinted in the appendix hereto, at 35a-37a. On October 26, 1989, in accordance with paragraph 3 of the escrow agreement, Ward presented the Arkansas Court of Appeals' mandate to Worthen, which paid him $418,000, in full and complete satisfaction of his state court judgment, plus accrued interest and attorneys' fees.

On October 30, 1989, the RTC returned to the district court and filed an "emergency motion" which requested it to issue an injunction: (a) vacating the mandate of the Arkansas Court of Appeals; (b) requiring Ward to return

the escrowed funds; and (c) barring the Arkansas Court of Appeals from taking any further action in the case. This "emergency motion" is reprinted in the appendix hereto, at 38a.

On October 31, 1989, after conducting a lengthy hearing on that motion, the district court determined that the RTC had "unclean hands" based on its counsel's inadequate investigation of the facts surrounding the release of the escrowed funds and the false and outrageous allegations its counsel had made against Ward and his attorney. As a result, the district court denied the RTC all of the requested injunctive relief. The district court's ruling from the bench denying the RTC's emergency motion for injunctive relief is reprinted in the appendix hereto, at 44a. Although the RTC could have taken a *direct appeal* of that decision to the Eighth Circuit, pursuant to 28 U.S.C. § 1292(a), it chose not to do so.

Instead, on November 13, 1989, the RTC returned to the Arkansas Court of Appeals—the same forum that only days earlier it had requested the district court to enjoin from exercising further jurisdiction—and filed a pleading captioned "Petition For Rehearing And For Recall Of Mandate Or, In The Alternative, Motion For Reconsideration." This petition is reprinted in the appendix hereto, at 52a. In this petition, the RTC requested the Arkansas Court of Appeals to reconsider its decision to exercise subject matter jurisdiction over the appeal. On November 17, 1989, Ward filed his response to that petition, in which he argued that the state appellate court had properly exercised its subject matter jurisdiction in issuing the *per curiam* order and mandate. This response is reprinted in the appendix hereto, at 60a.

On November 29, 1989, the Arkansas Court of Appeals reaffirmed its earlier determination of subject matter jurisdiction and entered an order denying the RTC's petition for rehearing. This order is reprinted in the appendix hereto, at 70a. Although the RTC could have taken a *direct appeal* of that decision to the Arkansas Supreme Court and, if necessary, to this Court, it chose not to do so and allowed the October 25, 1989 mandate to become final.

On May 7, 1990, the Eighth Circuit dismissed the RTC's appeal of the district court's April 28, 1989 order of remand on the ground that the RTC's second removal of the proceeding under FIRREA mooted all issues pertaining to the first removal of the appeal under 12 U.S.C. § 1730(k)(1). *Ward v. RTC*, 901 F.2d 694 (8th Cir. 1990). For the next nine months, the RTC took no action and gave no indication that anything more remained of this now fully and finally adjudicated matter.

On January 25, 1991, the RTC filed papers with the district court indicating that it intended to pursue this matter further. [Supp. App. 71-73] On July 11, 1991, well over two years after the RTC's first removal of this proceeding to federal court, it filed a motion for relief from Ward's final, fully satisfied state court judgment based on its *D'Oench* and 12 U.S.C. § 1823(e) defenses.

During a hearing on July 19, 1991, the district court ruled that the Arkansas Court of Appeals' October 25, 1989 mandate was entitled to *res judicata* effect. On July 31, 1991, the district court entered a judgment which adopted and incorporated by reference Ward's now final and fully satisfied state court judgment and denied the

RTC's motion for relief from that judgment. The district court's judgment, along with its supporting conclusions of law stated from the bench, are reprinted in the appendix hereto, at 7a.

On August 30, 1991, the RTC filed a notice of appeal of that judgment to the Eighth Circuit. On July 30, 1992, the Eighth Circuit reversed and remanded the case to the district court. *Ward v. RTC*, 972 F.2d 196 (8th Cir. 1992). In doing so, the Eighth Circuit held that: (a) the Arkansas Court of Appeals' October 25, 1989 mandate was "void" and not entitled to *res judicata* effect because the state court had incorrectly decided the issue of its subject matter jurisdiction; (b) the RTC's abandonment of its direct appellate remedies for challenging the state court's October 25, 1989 mandate did not bar it from collaterally attacking that decision in federal court; and (c) the RTC could assert its *D'Oench* and § 1823(e) defenses for the first time in a post-judgment appeal. On September 3, 1992, the Eighth Circuit entered an order denying Ward's petition for rehearing, along with his suggestion for rehearing *en banc*. This order is reprinted in the appendix hereto, at 13a.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's decision to apply *res judicata* only to those state court adjudications of subject matter jurisdiction which are "correct," rather than "fair," conflicts with decisions of this Court and other Circuits.

The Arkansas Court of Appeals unquestionably considered and fairly adjudicated the issue of its subject matter jurisdiction on two separate occasions--once before and once after it entered its October 25, 1989 mandate dismissing the appeal. In both instances, the state appellate court gave the parties a full and fair opportunity to brief and argue that issue before deciding in favor of exercising its jurisdiction.

In reaching that decision, the Arkansas Court of Appeals undoubtedly recognized that FIRREA does *not* vest federal courts with exclusive jurisdiction over all cases in which the RTC is a party. Rather, the applicable removal provision of that legislation, 12 U.S.C. § 1441a(*l*)(1) and (3), provides that the RTC *may* remove any action, suit, or proceeding to which it is a party from state court to federal court, which shall have "original jurisdiction" over all such proceedings.[4] In addition, FIRREA says nothing about the procedure that is to be followed after the RTC removes a case, and it is unclear whether the provisions of 28 U.S.C. § 1446 even apply in

---

[4] The RTC, in fact, has elected to litigate many cases in the state courts of Arkansas, and, to date, at least one of those cases has been appealed to and decided by the Arkansas Supreme Court. *Dillon v. RTC, as Conservator for Madison Guar. Sav. & Loan Ass'n*, 306 Ark. 172, 811 S.W.2d 765 (1991).

cases removed by the RTC pursuant to 12 U.S.C. § 1441a(*l*)(1) and (3).[5]

Thus, after removing this case to federal court, the RTC *voluntarily returned* to the Arkansas Court of Appeals and requested it to adjudicate the issue of subject matter jurisdiction in a novel context involving recently enacted federal statutes that had not yet been construed by the courts. After due consideration of the RTC's arguments to the contrary, the Arkansas Court of Appeals determined that it had subject matter jurisdiction over this appeal and proceeded to issue its October 25, 1989 *per curiam* order and mandate dismissing the RTC's appeal of Ward's underlying state court judgment. Since it fairly adjudicated the issue of its subject matter jurisdiction in deciding whether to grant Ward's motion to dismiss the appeal, the Arkansas Court of Appeals' *per curiam* order and mandate were entitled to *res judicata* effect. Thus, the Eighth Circuit overreached its authority in declaring that mandate to be "void" and in reversing the district court's holding that Ward's underlying final, fully satisfied state court judgment was entitled to full faith and credit in federal court.[6]

---

[5] In *RTC v. Key*, 733 F.Supp. 1086, 1089 (N.D. Tex. 1990), the court held that § 1446(b) does *not* govern cases removed by the RTC under FIRREA. *See also FSLIC v. Westgate Partners Ltd.*, 726 F.Supp. 807, 809 (D. Colo. 1989) (Because removal jurisdiction was based on 12 U.S.C. § 1441a(*l*)(3), the general removal provisions were held to be irrelevant.)

[6] Title 28 U.S.C. § 1738 imposes on federal courts the same full faith and credit requirements imposed on state courts by the U.S. Constitution, Art. IV, § 1. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 n. 9, 102 S.Ct. 1357, 1365 n. 9, 71 L.Ed. 558, 570 n. 9 (1982).

This Court repeatedly has held that a state court's determination of its subject matter jurisdiction, after both sides have had an opportunity to address the issue, is final and cannot be collaterally attacked in a second proceeding—even if the first court's resolution of the jurisdictional issue was patently incorrect. In *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), the Court explained the rationale for this rule as follows:

> It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect the second decision will be more satisfactory than the first.

Id. at 172, 59 S.Ct. at 138; *accord Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78, 60 S.Ct. 44, 51, 84 L.Ed. 85, 93 (1939) ("One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well as to jurisdiction of the subject matter as of the parties."); *Schroeder v. 171.174 Acres of Land*, 318 F.2d 311, 314 (8th Cir. 1963) ("The doctrine [of res judicata] is but a manifestation of the recognition that endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the preservation of the public tranquility requires that the matter be at an end.").

In *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963), a Nebraska state court was requested

to quiet title to certain land on the Missouri river. The subject matter jurisdiction of the Nebraska state court was dependent on whether the land in question was in Nebraska or Missouri—an issue that turned on whether a shift in the river's course had been caused by avulsion or accretion. Respondents appeared and contested the Nebraska state court's subject matter jurisdiction. The trial court resolved that issue in favor of the petitioner, and the Nebraska Supreme Court affirmed.

Respondents later sued in a Missouri state court to quiet title to the same land, claiming it was in Missouri. The case was removed to federal court, and ultimately, reached this Court after the Eighth Circuit ruled that *res judicata* principles did not defeat relitigation of the issues presented.

The Court, in *reversing*, squarely held that a judgment "is entitled to full faith and credit—even as to matters of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Id.* at 111, 84 S.Ct. at 245. In reaching this decision, the Court noted that the general rule of finality has exceptions, citing *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940) (preemption) and *U.S. v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (sovereign immunity). The Court also noted, however, "that in neither of those cases had jurisdictional issues actually been litigated in the first forum." *Durfee*, 375 U.S. at 114 n. 12, 84 S.Ct. at 247. *Accord*: *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 2104 n. 9, 72 L.Ed.2d 492, 501 n. 9 (1982); *Kremer v.*

Chemical Construction Corporation, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n.*, 455 U.S. 691, 706-707, 102 S.Ct. 1357, 1366-67, 71 L.Ed.2d 558 (1982); *see also Fidelity Standard Life Ins. Co. v. First Natl. Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) ("Appellants' sole argument is that the Louisiana judgment is void because that state lacked jurisdiction to determine the case. But the jurisdictional issue was duly raised, argued and decided by the Louisiana Civil District Court. Because the jurisdictional issue was fully litigated in the original court, this issue may not be litigated by way of collateral attack.").

The RTC raised and vigorously contested the issue of subject matter jurisdiction before the Arkansas Court of Appeals in post-removal proceedings that it initiated. Rather than limit its inquiry to a determination of whether there had been a "fair" adjudication of that issue before the state appellate court, the Eighth Circuit used its own subjective view of whether the state court's ruling was "correct" as a litmus test for applying the doctrine of *res judicata*. That decision has created a confusing precedent which is likely to generate even further confusion among the other Circuits regarding not only one of the most crucially important of all common law doctrines, but also the narrow range of circumstances in which a federal court can declare the equally sovereign decisions of parallel state appellate courts to be "void." Furthermore, it is a precedent directly at odds with this Court's ruling in *Durfee* and its progeny. Thus, plenary review by this Court is essential.

II.

The Eighth Circuit's decision to allow the RTC to collaterally attack the Arkansas Court of Appeals' October 25, 1989 mandate, after abandoning its direct appellate remedies for challenging that decision, conflicts with decisions of this Court and other Circuits.

After the Arkansas Court of Appeals entered its October 25, 1989 mandate, the RTC could have taken a *direct appeal* of that decision to the Arkansas Supreme Court and, if necessary, to this Court. Instead of pursuing that option, the RTC returned to the district court and filed an emergency motion seeking an injunction vacating the state court's mandate. [Supp. App. 22-28] Although the RTC could have taken a *direct appeal* of the district court's denial of that motion to the Eighth Circuit pursuant to 28 U.S.C. § 1292(a), it elected not to do so. Instead, the RTC once again voluntarily returned to the Arkansas Court of Appeals, where its petition to reconsider or recall the October 25, 1989 mandate was later denied. While the RTC could have taken a *direct appeal* of the state appellate court's denial of that petition to the Arkansas Supreme Court and, if necessary, to this Court, it again elected not to do so.

Having abandoned all of it direct state and federal appellate remedies for challenging the Arkansas Court of Appeals' mandate dismissing its appeal of Ward's now final, unappealable, and fully satisfied state court judgment, the RTC did absolutely nothing to contest that decision for more than nineteen months. Finally, on July 11, 1991, the RTC decided to initiate a collateral attack on

that mandate and Ward's underlying state court judgment by filing its "Motion for Relief from Judgment" in the district court.

This Court repeatedly has held that a litigant's failure to pursue direct appellate remedies for challenging a state court decision bars a later collateral attack on that decision in federal court. For example, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this Court, in rejecting an attempt by the Ninth Circuit to create an "equitable exception" to the strict application of the doctrine of *res judicata*, stated the following:

> This Court's rigorous application of *res judicata* in *Reed* . . . makes clear that this Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals. . . . Moreover, in contrast to *Reed*, where it was unclear why no appeal was taken, it is apparent that respondents here made a calculated choice to forego their appeal.

Moitie, 452 U.S. at 400-401, 101 S.Ct. at 2429. The Court concluded its decision with the following observation, which is equally applicable to the situation the RTC created for itself in this case: "[T]he language used by this Court half a century ago is even more compelling in view of today's crowded dockets: 'The predicament in which respondent finds himself is of his own making. . . . ' " *Id.* at 401, 101 S.Ct. at 2429 (quoting *Reed v. Allen*, 286 U.S. 191, 198-99, 52 S.Ct. 523, 533, 76 L.Ed. 1054, 1056 (1932)). *Accord*: *Ackermann v. United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 211, 95 L.Ed. 207, 211 (1950) (holding that petitioners were not entitled to relief under Rule 60(b) of

the Federal Rules of Civil Procedure when they had made a "free, calculated, deliberate choice" not to appeal); *Angel v. Bullington*, 330 U.S. 183, 187-89, 67 S.Ct. 657, 659-661, 91 L.Ed. 832, 835-837 (1947) ("That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata*. * * * If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him."); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 44 S.Ct. 149, 150, 68 L.Ed. 362, 365 (1923) ("If the constitutional questions stated in the bill actually arose in the cause [litigated in state court], it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate procedure.") *See also Alleghany Corporation v. Kirby*, 340 F.2d 311 (2nd Cir. 1965); *Connor v. Real Title Corporation*, 165 F.2d 291 (4th Cir. 1947).

In its July 30, 1992 opinion, the Eighth Circuit cites only *Steamship Co. v. Tugman*, 106 U.S. 118, 122-23 (1882), to support its conclusion that, because the state court's mandate was void, the "RTC and Madison Financial had no need to appeal the order further in the state courts." However, *Steamship* in no way supports the proposition that a removing party can abandon direct appellate remedies for challenging a state court's allegedly erroneous post-removal exercise of subject matter jurisdiction over a case and, later, use the federal court as a forum for collaterally attacking the first court's decision.

In *Steamship*, the plaintiff filed suit in New York state court against National Steamship Company ("Steamship"), a corporation organized and existing under the laws of Great Britain and Ireland. Although Steamship properly removed the case to federal court, the state court rejected Steamship's argument that it had been ousted of jurisdiction and proceeded to try the case. The trial resulted in a judgment against Steamship, which it unsuccessfully appealed to the New York Supreme Court and Court of Appeals on the ground that its earlier removal of the case to federal court had ousted the state court of jurisdiction. Only after appealing the decision of the New York Court of Appeals to this Court did Steamship finally vindicate its right to a federal forum. Thus, *Steamship* highlights the importance of a removing party's pursuing to exhaustion the *direct* appellate remedies available for challenging a state court's erroneous exercise of jurisdiction over an action that has been properly removed to federal court.

In this case, the RTC failed to pursue the direct appellate remedies available for securing a timely resolution of the issues surrounding the validity and effect of the Arkansas Court of Appeals' mandate dismissing its appeal of Ward's state court judgment. Furthermore, just as in *Moitie*, the RTC's "predicament is of [its] own making," for it made a "calculated choice" not to appeal the Arkansas Court of Appeals' mandate dismissing the appeal to the Arkansas Supreme Court and, if necessary, to this Court. In doing so, the RTC "concluded [the] litigation as effectively as though [it] had proceeded through the highest tribunal available." *Angel*, 330 U.S. at 189, 67 S.Ct. at 661.

The Eighth Circuit's decision creates a dangerous "exception" to this Court's historically rigorous application of *res judicata* which other Circuits may follow or, possibly, even expand. Additionally, it is in direct conflict with this Court's holding in *Moitie* and the *Rooker-Feldman* doctrine. Therefore, it is of great importance that this Court grant plenary review to make it clear that the doctrine of *res judicata* does not contain a "collateral attack exception" that can be utilized in lieu of exhausting available direct appellate remedies.

III.

The Eighth Circuit's decision to allow the RTC to assert its *D'Oench* and 12 U.S.C. § 1823(e) defenses for the first time in a post-judgment appeal conflicts with decisions of other Circuits.

Based on facts similar to those involved in this case, the Fifth and the Tenth Circuits have held that the RTC and the FDIC cannot raise *D'Oench* and Section 1823(e) defenses for the first time on appeal. *Olney Savings & Loan Ass'n. v. Trinity Banc Savings Ass'n.*, 885 F.2d 266 (5th Cir. 1989); *Grubb v. FDIC*, 833 F.2d 222, 224-26 (10th Cir. 1987). *See also Thurman v. FDIC*, 889 F.2d 1441 (5th Cir. 1989); *FDIC v. Hadid*, 947 F.2d 1153, 1157 (4th Cir. 1991) (citing with approval the courts' rationale in *Olney* and *Grubb* for denying the FDIC and FSLIC the right to assert the *D'Oench* defense for the first time in a post-judgment appeal); *Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66 (Tex. S.Ct. 1992); *N.W. Land v. New West Fed. Sav. & Loan*, 827 P.2d 334 (Wash. Ct. App. 1992).

Rather than follow *Olney* and *Grubb*, the Eighth Circuit relied on *Baumann v. Savers Fed. Sav. & Loan Ass'n.*, 934 F.2d 1506, 1512-13 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1936 (1992), and *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332 (1st Cir. 1992), to support its holding that the RTC can assert *D'Oench* and Section 1823(e) defenses for the first time on appeal because the "RTC did not become a party and had no opportunity to raise the *D'Oench* and Section 1823(e) defenses until after the state trial." *Ward v. RTC*, 972 F.2d at 199.

In both *Baumann* and *In re 604 Columbus Ave. Realty Trust*, the courts *rejected* the arguments of the RTC and the FDIC that they should be allowed to assert their *D'Oench* and Section 1823(e) defenses in *all* cases in which they did not become a party and had no opportunity to raise those defenses until after the state trial. Instead, both courts conducted a balancing test to determine whether the specific circumstances of each case were "sufficiently exceptional" to justify allowing those new federal defenses to be raised for the first time on appeal.

In *In re 604 Columbus Ave. Realty Trust*, the court specifically cited the following factors which should be weighed in deciding whether to allow the RTC or the FDIC to assert the foregoing defenses for the first time on appeal: (a) whether the assertion of the *D'Oench* and Section 1823(e) defenses would give rise to purely legal questions that required no further development of the factual record; and (b) whether the underlying equities would make it unfair if the RTC or the FDIC were prevented from raising their federal defenses. In this case, those factors weigh heavily against allowing the RTC to

raise its *D'Oench* and Section 1823(e) defenses for the first time on appeal.

First, it is fundamentally unfair to Ward to remand this case to the district court so that the record can be developed on what the Eighth Circuit characterized as "several factual disputes" on the applicability of the *D'Oench* and Section 1823(e) defenses. Since Madison Guaranty was declared insolvent on February 10, 1989, its records and those of MFC have been removed, relocated, reviewed, and examined by so many state and federal regulatory agencies and interested third parties that it is now impossible to rely on the integrity and completeness of those records. Thus, those records no longer form a reliable basis for resolving the single most critical "factual dispute" relevant to the applicability of the *D'Oench* and Section 1823(e) defenses: Has Ward's fully executed written commission contract with Madison Guaranty and MFC, dated September 24, 1985, been maintained in the books and records of one or both of those entities since the date it was executed?

Second, in sharp contrast to the underlying facts in *Baumann* and *In re 604 Columbus Ave. Realty Trust*, the RTC's predecessor in interest, FSLIC, took control of Madison Guaranty and MFC under an August 15, 1986 order to cease and desist over two years *before* this case was tried in state court. [App. 203-32] The uncontroverted testimony at trial revealed that after the entry of that order to cease and desist, "basically nothing" happened at Madison Guaranty and MFC without the *prior approval* of FSLIC. [App. 118:13-22] Thus, FSLIC was the real party in interest for purposes of defending Ward's state court action against Madison Guaranty and

MFC. This left FSLIC free to gamble on the outcome of the state court litigation, since FSLIC knew Madison Guaranty would soon be declared "officially" insolvent and that, if it lost the state court trial, it could play its *D'Oench* trump card and seek to vacate Ward's judgment.

In *Thurman v. FDIC*, 889 F.2d 1441 (5th Cir. 1989), the court, in refusing to allow the FDIC to assert its *D'Oench* defense for the first time on appeal explicitly noted that:

> Nor are we unmindful that our approach [refusing to allow FDIC to assert its post-judgment *D'Oench* defense] creates a disincentive [for FDIC] to gamble on a verdict while holding a *D'Oench* trump card.

Id. at 1447.

In this case, the Eighth Circuit has allowed the RTC to wait almost three years after the entry of Ward's state court judgment to assert its *D'Oench* and Section 1823(e) defenses for the first time in a post-judgment appeal. The Eighth Circuit's holding is in conflict with the Fourth, Fifth, and Tenth Circuits' decisions in *Hadid, Olney, Grubb,* and *Thurman,* as well as the Texas Supreme Court's decision in *Larsen* and the Washington Court of Appeals decision in *N.W. Land.* Because the lower federal and state courts are in urgent need of guidance from this Court on the circumstances, if any, under which the RTC can assert its *D'Oench* and Section 1823(e) defenses for the first time in a post-judgment appeal from a state court's judgment, the Court should grant plenary review.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

THOMAS RAY
SHULTS, RAY AND KURRUS
200 West Capitol
Suite 1600
Little Rock, Arkansas 72201-3637
(501) 375-2301

Counsel for Petitioner

November 30, 1992

APPENDIX

Seth WARD, Appellee,

v.

RESOLUTION TRUST CORPORATION, as Receiver for Madison Guaranty Savings & Loan Association; Madison Financial Corporation, Appellants.

No. 91-3015.

United States Court of Appeals,
Eighth Circuit.

Submitted May 12, 1992.

Decided July 30, 1992.

Employee brought action in state court against financial institution which employed him for unpaid real estate sales commissions. The state trial court entered judgment in favor of employee, and financial institution appealed to State Appellate Court. While state appeal was pending, the Resolution Trust Corporation (RTC) became receiver for financial institution and removed case to federal district court. The state appellate court dismissed financial institution's appeal. The RTC and financial institution filed motion requesting that federal district court vacate state trial court judgment. The United States District Court for the Eastern District of Arkansas, Stephen M. Reasoner, J., denied motion and entered judgment for employee consistent with state trial court judgment, and RTC and financial institution appealed. The Court of Appeals, Fagg, Circuit Judge, held that: (1) state appellate court's order dismissing appeal was void; (2) RTC and financial institution's failure to appeal state appellate court's order did not preclude

them from attacking order in district court; (3) res judicata did not bar RTC and financial institution from relitigating issues; (4) RTC and financial institution did not waive federal jurisdiction by postremoval conduct in state court; and (5) RTC could properly raise defenses unavailable to financial institution in state trial after removal to federal court.

Reversed and remanded.

Robert P. Fletcher, Washington, D.C., argued (Glenn Harrison, Tulsa, Okl., Daniel H. Kurtenbach, Washington, D.C., Michael G. Thompson & Harry A. Light, Little Rock, Ark., Panos S. Midis & Deborah A. Savarese, Washington, D.C. on the brief), for appellants.

Joe Thomas Ray, Little Rock, Ark., argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, FAGG and MAGILL, Circuit Judges.

FAGG, Circuit Judge.

The Resolution Trust Corporation (RTC) and Madison Financial Corporation (Madison Financial) appeal the district court's order entering judgment for Seth Ward. We reverse and remand.

Ward sued his employer, Madison Guaranty Savings & Loan Association (Madison Guaranty), and Madison Financial, a wholly owned subsidiary of Madison Guaranty, in Arkansas state court for unpaid real estate sales commissions. The state trial court entered judgment in

favor of Ward. Madison Financial and Madison Guaranty appealed to the state court of appeals.

While the state appeal was pending, the Federal Home Loan Bank Board declared Madison Guaranty insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as Madison Guaranty's conservator. The RTC succeeded FSLIC as Madison Guaranty's conservator under 12 U.S.C. § 1464(d)(2)(H)(ii) (Supp.II 1990), and the RTC later became receiver for Madison Guaranty. The RTC removed this case to federal district court, and we held the removal was proper. *Ward v. Resolution Trust Corp.*, 901 F.2d 694, 695 (8th Cir.1990).

The RTC and Madison Financial then filed a motion in the state court of appeals seeking to obtain the state court record to use in the federal district court. Ward resisted this motion and asked the state appellate court to dismiss the state appeal or, alternatively, affirm the state trial court judgment. The RTC and Madison Financial responded to Ward's motion contending the removal to federal court divested the state appellate court of jurisdiction. The state court of appeals denied the RTC and Madison Financial's motion and dismissed the appeal. The RTC and Madison Financial did not appeal this order further in the state judicial system.

Following the state appellate court's order, the RTC and Madison Financial filed a motion under Federal Rule of Civil Procedure 60(b) requesting that the district court vacate the state trial court judgment and reconsider the issues in light of their newly-raised defenses based on 12 U.S.C. §§ 1821(d)(9), 1823(e) (Supp. II 1990), and *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed.

956 (1942). The district court denied the RTC and Madison Financial's motion and entered judgment for Ward consistent with the state trial court judgment.

On appeal, the RTC and Madison Financial contend only the district court had jurisdiction once the case was removed to federal court, thus making the state appellate court's dismissal order void. We agree. The district court gained jurisdiction when the RTC and Madison Financial properly removed the case to federal court pending the state appeal. *Ward*, 901 F.2d at 695; *see In re Meyerland Co.*, 960 F.2d 512, 516 (5th Cir.1992) (en banc); *In re Savers Fed. Sav. & Loan Ass'n*, 872 F.2d 963, 966 (11th Cir.1989). After removal, only the federal district court could restore jurisdiction to the state courts. *Steamship Co. v. Tugman*, 106 U.S. 118, 122, 1 S.Ct. 58, 60, 27 L.Ed. 87 (1882). Thus, the state court of appeals could proceed no further, 28 U.S.C.A. § 1446(d) (West Supp.1992), making its dismissal of the state appeal void, *see, e.g., Steamship*, 106 U.S. at 122, 1 S.Ct. at 60; *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 566, 61 S.Ct. 715, 717, 85 L.Ed. 1044 (1941).

Ward nevertheless asserts several reasons why we should give effect to the state appellate court's order. Ward asserts the RTC and Madison Financial's failure to appeal the order precludes them from attacking the order in the district court. We disagree. The state appellate court's order dismissing the state appeal was void, and the RTC and Madison Financial had no need to appeal the order further in the state courts. *Steamship*, 106 U.S. at 123, 1 S.Ct. at 61.

Ward next asserts res judicata bars the RTC and Madison Financial from relitigating the issues. We disagree. Because the state appellate court's order dismissing the state appeal is void, the state court judgment lacks preclusive effect as a final judgment. "[I]t is axiomatic that, before a judgment can have issue preclusive effect under the doctrines of either res judicata or collateral estoppel, that judgment must be *valid.*" *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 172 (D.C.Cir.1981).

Ward also asserts the RTC and Madison Financial waived federal jurisdiction by their postremoval conduct in the state court of appeals. *Cf. Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir.1986) (waiving right to remove by defending an action in state court). The RTC and Madison Financial requested a release of the record in an attempt to transfer the record to federal court. The motion did not request a ruling on the merits of the appeal or an abandonment of federal jurisdiction. If the motion were improper or filed in the wrong court, the state court of appeals simply could have denied the motion as it did. The state court of appeals did not consider the merits of the appeal. When Ward filed his motion to dismiss the state appeal or affirm the state judgment, the RTC and Madison Financial responded that jurisdiction was in the federal court. Given these circumstances, we conclude the RTC and Madison Financial did not waive federal jurisdiction. Thus, the district court had jurisdiction to consider the merits of Ward's claim in light of the RTC and Madison Financial's newly-raised defenses.

The RTC and Madison Financial contend Ward's claim for real estate sales commissions is based on an

unrecorded side agreement barred by *D'Oench* and section 1823(e). These defenses are available to the RTC as receiver, but were not available to Madison Guaranty or Madison Financial during the state trial. *See, e.g., Resolution Trust Corp. v. McCrory,* 951 F.2d 68, 71 (5th Cir.1992), *petition for cert. filed,* 60 U.S.L.W. 3816 (U.S. May 11, 1992) (No. 91-1842). Ordinarily, defenses not raised at the trial level are lost. *Gregory v. Honeywell, Inc.,* 835 F.2d 181, 184 (8th Cir.1987). This rule, however, is one of prudence and discretion. *Struempler v. Bowen,* 822 F.2d 40, 42 (8th Cir.1987). The RTC did not become a party and had no opportunity to raise the *D'Oench* and section 1823(e) defenses until after the state trial. In these circumstances, the RTC can properly raise these defenses after removal in its Rule 60(b) motion. *See In re 604 Columbus Ave. Realty Trust,* 968 F.2d 1332, 1343 (1st Cir. 1992); *Meyerland,* 960 F.2d at 519; *Baumann v. Savers Fed. Sav. & Loan Ass'n,* 934 F.2d 1506, 1512-13 (11th Cir. 1991), *cert. denied,* ___U.S.___, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992).

Because the district court has not addressed the RTC's newly-raised defenses and Ward's contentions these defenses do not apply, and our review of the record discloses several factual disputes the district court must first address, we reverse and remand to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SETH WARD — PLAINTIFF

VS. NO. LR-C-89-807

RESOLUTION TRUST CORPORATION, As Conservator for Madison Guaranty Savings & Loan and MADISON FINANCIAL CORPORATION — DEFENDANT

JUDGMENT

(Filed July 31, 1991)

In accordance with the judgment entered in this case in the Circuit Court of Pulaski County, Arkansas on September 6, 1988, and for the reasons stated from the bench at the conclusion of the hearing in this case on July 19, 1991, judgment is hereby entered in favor of Seth Ward in the amount $353,502.57 with interest thereon at the rate of ten percent (10%) per annum from September 6, 1988, which judgment has been paid and satisfied in full and no execution shall issue hereon.

The motion of the Resolution Trust Corporation for relief from judgment is denied. All other pending motions are rendered moot by the entry of this judgment.

It is SO ORDERED this 31st day of July, 1991.

/s/ Stephen M. Reasoner
UNITED STATES
DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 7/31/91 BY [illegible]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SETH WARD Plaintiff, v. RESOLUTION TRUST CORPORATION, as Conservator for Madison Guaranty Savings and Loan Association, and Madison Financial Corporation Defendants.	* * *

Court Reporter:

Eugenie M. Power
P.O. Box 1540
Little Rock, Arkansas 72203

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[p. 17] was to point out to the Arkansas Court of Appeals that they no longer had jurisdiction, I mean, what Mr. Ray is saying is that because we responded to that, that somehow we took the case back from this court back down to the Arkansas Court of Appeals, which just can't happen. This case was in federal district court at the time the Arkansas Court of Appeals took its action.

THE COURT: Well, you know, I have this theory that the time comes for the Court to do something, even if it's wrong. Because I think it would be a tremendous waste of judicial resources to try this case – first of all, to try this case all over again, which I don't think FIRREA intends for us to do that. I do tend to agree with Mr. Ray that this judgment has become final. But in any event, I think the appropriate thing for this Court to do is to enter judgment in favor of Mr. Ward pursuant to the state court judgment which has become final. And then the RTC can take that judgment and what other actions or inactions by this Court that it feels is inappropriate and appeal the matter to the Eighth Circuit, and the Eighth Circuit will decide whether it agrees with the Court's view of this, which is suggested by Mr. Ray, that this has become a final judgment and this cannot now be tried again or attacked or set aside at this point, or whether, in

fact, upon remand, if the Court agrees with you, Mr. Light, the case should be retried from the beginning or whether the Court should conduct some evidentiary hearing on your contentions, especially regarding Mr. Ward, and whether based on those the [p. 18] Court should do something further. And maybe in the meantime as this case works its way up the appellate ladder the issues or the law will crystalize somewhat and we can then see what happens to it. But I think it's really the only logical thing the Court can do at this point. Otherwise, I really foresee us perhaps spending two weeks – not two weeks – three days trying the case, or more, and all the work going in for the parties and litigants only perhaps to have the Eighth Circuit tell us that we have wasted our time and the judgment had been final and we should not have tried it.

MR. RAY: Your Honor, if it please the Court, I would like to, with the Court's permission, supplement the record in this case, since it is going up to the Eighth Circuit, by filing with the district clerk those pleadings that were filed in the Arkansas Court of Appeals after the October 31 hearing that took place in this case so the Eighth Circuit –

THE COURT: Yes. Mr. Light, do you have anything you wish to add to the record?

MR. LIGHT: I just – Your Honor, is it my understanding that you're going to, in effect, adopt the state court judgment and enter it as a judgment of this court?

THE COURT: So you'll have a judgment to appeal from to the Court of Appeals.

MR. RAY: And, Your Honor –

THE COURT: Also, the judgment will – I guess this [p. 19] judgment should show itself as satisfied.

MR. RAY: Yes, Your Honor.

THE COURT: Self-satisfying judgment, so you don't have to worry about anybody coming over there trying to collect a judgment from you. You do state as attorney for Mr. Ward that the judgment has been fully satisfied?

MR. RAY: Yes, Your Honor, the judgment has been fully satisfied.

THE COURT: Very well. All right. We may well be here again, but we'll deal with that if and when the time comes. All right?

MR. RAY: Thank you, Your Honor.

MR. LIGHT: Thank you, Your Honor.

THE COURT: All right.

CERTIFICATE

I, Eugenie M. Power, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of proceedings in the above-entitled case.

/s/ Eugenie M. Power
Eugenie M. Power,
Official Reporter

Date: August 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3015EALR	*	Order Denying
Seth Ward	*	Petition for
	*	Rehearing and
Appellee,	*	Suggestion for
v.	*	Rehearing En
	*	Banc
Resolution Trust Corporation, etc.,	*	
	*	
Appellant.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

September 3, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
SECOND DIVISION

2-88-2868

SETH WARD — PLAINTIFF

VS. — NO. 87-7580

MADISON GUARANTY SAVINGS & LOAN ASSOCIATION and MADISON FINANCIAL CORPORATION — DEFENDANTS

JUDGMENT

On the 30th day of August, 1988, this cause came on to be heard, plaintiff appearing in person and by his attorneys, Roger D. Rowe and Alston Jennings, and defendants appearing by their attorneys, Sherry P. Bartley and Lyn P. Pruitt, and all parties announcing ready for trial, a jury composed of Jae Lynn Wilson and 11 other members of regular panel of the petit jury for this term of court were duly selected, impaneled, and sworn to try the issues of fact arising herein.

After hearing the opening statements of counsel, receiving the testimony and evidence presented on behalf of all parties, hearing the arguments of counsel and the instructions of the Court, the jury retired on August 31, 1988, to consider its verdict and thereafter returned into open court the following verdict, to-wit:

> "We, the jury, find for Seth Ward on his complaint against Madison Guaranty Savings & Loan Association and Madison Financial Corporation and fix his damages at $391,845.

/s/ Jae Wilson
M. A. Limbird
Mollie Martin
Betty Brady
Edwin Cromwell Levy
Janet Moore Garrett
Mary Justice
Juanita McGinister
Dorothy Hutson
James H. Lercher."

The parties stipulated that if the jury returned a verdict for as much as $300,000 against Madison Financial Corporation that $300,000 of the verdict would be considered to be based upon a certain note executed by Madison Financial Corporation in the amount of $300,000 on April 7, 1986, and bearing interest at the rate of 12 percent per annum.

It was further stipulated and agreed that the defendants were entitled to an offset against any judgment rendered against them by reason of a certain note executed by the plaintiff to Madison Guaranty Savings & Loan Association, dated June 10, 1986, in the amount of $93,000, together with interest at the rate of 10 1/2 percent per annum in the amount of $21,803.68.

Based upon the jury verdict and the stipulations recited above, the Court finds that the plaintiff is entitled to recover $300,000 by reason of the said note of April 7, 1986, together with interest in the total amount of $86,466.25, $10,000 of which the plaintiff admits has already been paid. He is further entitled to recover the sum of $91,840, for a total of $468,306.25. The Court further finds that defendants are entitled to have the sum

of $114,803.68 offset against the said amount due to plaintiff, leaving a balance due plaintiff of $353,502.57.

Both plaintiff and Madison Guaranty Savings & Loan Association are seeking a judgment for attorneys' fees on the respective notes. The Court is reserving that question until a hearing can be held.

WHEREFORE, it is by the Court considered, ordered, and adjudged that the plaintiff, Seth Ward, have and recover of and from the defendants, Madison Guaranty Savings & Loan Association and Madison Financial Corporation, the sum of $353,502.57, together with all of his costs herein expended, which said judgment shall bear interest at the rate of 10 percent per annum from the date hereof, and upon which judgment execution or garnishment or other process may issue.

DATED this 6th day of September, 1988.

/s/ Perry V. Whitmore
CIRCUIT JUDGE

ESCROW AGREEMENT

This Agreement (the "Agreement") dated November 9th, 1988, between Seth Ward, Madison Guaranty Savings & Loan Association ("Madison Guaranty"), a state chartered savings and loan association, and Worthen Bank & Trust Company, N.A., ("Escrow Agent"), a national banking association, witnesses that Seth Ward has obtained a judgment, jointly and severally, against Madison Guaranty and Madison Financial Corporation, which was entered on September 6, 1988, in an action in Pulaski County Circuit Court, Case No. 87-7580 (the "Action"). Madison Guaranty has agreed to post security in lieu of a supersedeas bond by depositing the full amount of the judgment, plus interest, costs, and attorneys' fees, pending the appeal of the Action (the "Appeal"). Whereas the parties desire to execute an escrow agreement, it is therefore agreed as follows:

1. *Escrow Agent.* The parties hereto hereby appoint Worthen Bank & Trust Company, N.A., Worthen Bank Building, P.O. Box 1681, Little Rock, Arkansas 72203 as escrow agent ("Escrow Agent") and Escrow Agent hereby agrees to serve as the Escrow Agent, all in accordance with the terms and conditions of this Escrow Agreement.

2. *Deposit of Escrow Fund.* The Escrow Agent acknowledges receipt of the sum of $400,000.00 to be invested in an interest-bearing account or such other investment as may be agreed to by Seth Ward and Madison Guaranty. Said sum plus accrued interest thereon shall hereinafter be referred to as the "Escrow Fund." The Escrow Fund is security for the judgment entered in the

Action in the amount of $353,502.57, post-judgment interest thereon from September 6, 1988 at the rate of ten percent (10%) per annum, costs of $90.20, and attorneys' fees of $25,000.00.

3. *Disposition of Fund.* The Escrow Fund shall be held by the Escrow Agent from the date of this Agreement in an account separate and apart from the other funds of the Escrow Agent. The Escrow Agent shall release the Escrow Fund upon presentment of notice, by mandate, order, or other appropriate notice that the judgment appealed from has been finally affirmed, dismissed, reversed, or otherwise settled by Madison Guaranty and Seth Ward. Upon notice that the judgment appealed from has been affirmed, that the Appeal has not been prosecuted to final conclusion, or that the Appeal for any cause has been dismissed, the Escrow Agent shall pay Seth Ward from the Escrow Fund (i) the full amount of the judgment entered in the Action, together with accrued interest, costs, and attorneys' fees, or (ii) such amounts affirmed against Madison Guaranty on the Appeal, and shall pay Madison Guaranty the balance of the Escrow Fund, if any. Upon notice that the judgment appealed from has been reversed, the Escrow Agent shall pay the Escrow Fund to Madison Guaranty.

4. *Disputes.* In the event of any dispute with respect to all or part of the Escrow Fund, the Escrow Agent shall not be obligated to disburse the disputed portion thereof nor shall the Escrow Agent be required affirmatively to commence any action against Seth Ward or Madison Guaranty. In its sole discretion, the Escrow Agent may, in the event of a dispute as to the disposition of all or part of the Escrow Fund, commence an action in the nature of

interpleader and seek to deposit the disputed portion in a court of competent jurisdiction.

5. *Fee.* The fee of the Escrow Agent has been fixed by Madison Guaranty and the Escrow Agent under a separate agreement. Said fee shall be paid from the Escrow Fund, but shall be the sole responsibility of Madison Guaranty. The Escrow Agent shall not be entitled to any additional fee for services rendered under this Agreement.

6. *Hold Harmless.* The parties hereto hereby jointly and severally agree to hold Escrow Agent harmless from and against all costs, charges, damages and attorneys' fees which it in good faith may incur or suffer in connection with or arising out of this Escrow Agreement, excepting only those actions caused by the Escrow Agent's negligence or willful misconduct.

7. *Governing Law.* This Agreement shall be construed in accordance with the laws of the State of Arkansas.

8. *Notice.* Any notice or other communication required or permitted hereunder shall be sufficiently given if delivered in person or sent by United States certified or registered mail, postage prepaid, return receipt requested, addressed as follows:

(a) If to Seth Ward:

Mr. Seth Ward
c/o Alston Jennings, Sr. or Roger D. Rowe
Wright, Lindsey & Jennings
200 West Capitol Avenue
2200 Worthen Bank Building
Little Rock, Arkansas 72201

(b) If to Madison Guaranty:

Madison Guaranty Savings & Loan Association
c/o Sherry P. Bartley or Lyn Peeples Pruitt
Mitchell, Williams, Selig & Tucker
1000 Savers Federal Building
Little Rock, Arkansas 72201

(c) If to Escrow Agent:

Worthern Bank & Trust Company, N.A.
Worthern Bank Building
P.O. Box 1681
Little Rock, Arkansas 72203
(501) 378-1000

Any party may change its above mailing address during the term of this Escrow Agreement by written notice to the other parties.

9. *Reliance Upon Written Instructions.* The parties agree that the Escrow Agent shall be entitled to rely upon the face of Mandates, Orders, Affidavits, and instructions, and shall not be required to investigate the authority of the person executing and delivering such instructions, or otherwise verify the accuracy of the statements or information presented therein.

10. *Successors in Interest.* This Escrow Agreement shall be binding upon the parties hereto and their respective estates, heirs, representatives, successor and assigns and shall inure to the benefit of such persons.

11. *Modification*. This Agreement may not be altered or modified without the express consent of Seth Ward, Madison Guaranty and the Escrow Agent.

MADISON GUARANTY
SAVINGS AND LOAN
ASSOCIATION

By /s/ Tommy Trantham
Tommy Trantham
President

ATTEST:
/s/ Sue Illegible
Secretary

SETH WARD

By /s/ Seth Ward

ATTEST:

_____

ESCROW AGENT

WORTHEN BANK &
TRUST COMPANY, N.A.

By /s/ Illegible

ATTEST:
/s/ Myra D. Underwood

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SETH WARD PLAINTIFF

VS. NO. LR-C-89-807

(Formerly Arkansas Court of Appeals No. CA 89-124)

RESOLUTION TRUST CORPORATION
as Conservator for Madison Guaranty
Savings & Loan and
MADISON FINANCIAL CORPORATION DEFENDANTS

NOTICE OF REMOVAL

(Filed Sept. 25, 1989)

Resolution Trust Corporation ("RTC") by its managing agent the Federal Deposit Insurance Corporation ("FDIC"),[1] as Conservator for Madison Guaranty Saving & Loan, pursuant to 12 U.S.C. §1441A(*l*)(3)[2], §1441A(b)(4)[3], 12 U.S.C. §1821(d)(13)(B)[4] and 28 U.S.C. §1441, *et seq.*, gives notice that the case of Seth *Ward v. Madison Guaranty Savings & Loan Association and Madison Financial Corporation*, formerly pending in the Circuit Court of Pulaski County, Arkansas, Second Division, Case No. 87-7580, having been appealed to the Arkansas Court of Appeals, Case No. CA 89-124, has been removed to the United States District Court for the Eastern District of Arkansas, Western Division.

This Court has original jurisdiction of this action under the provisions of 28 U.S.C. §1331, 28 U.S.C. §1346 and 12 U.S.C. §1441A(*l*)(1)[5] and this action is removed to this Court by the RTC, without bond or security, pursuant

to 12 U.S.C. §1441A(*l*)(3), 12 U.S.C. §1441A(b)(4), 12 U.S.C. §1821(d)(13)(B) and 28 U.S.C. §1441, *et seq.* This litigation arises under federal law including, among other federal laws, the federal law announced by the United States Supreme Court in its decision in the *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), holding that alleged oral agreements between a federally insured institution and its borrowers cannot be used against conservators, the federal law that punitive damages and penalties cannot be imposed against conservators, and federal laws governing the operation of federally insured financial institutions, including fiduciary duties.

A copy of the entire record before the Arkansas Court of Appeals, Case No. CA 89-124, was previously filed with the United States District Court on March 10, 1989 in connection with Case No. LR-C-89-180, and a copy of the record previously filed is attached hereto as Exhibit "A". The original record before the Arkansas Court of Appeals has been requested by the RTC pursuant to that Motion for Release of Record filed of even date herewith in the Arkansas Court of Appeals. Copies of the process, pleadings and orders filed in the Arkansas Court of Appeals and served upon the RTC since March 10, 1989 are attached hereto as Exhibit "B".

A copy of this Notice of Removal, without attachments, will be filed this date with the Clerk of the Arkansas Court of Appeals, in Case No. CA 89-124, and all attorneys of record will be immediately served with a

copy of this Notice, without Exhibit "A", hand delivery on this date.

Respectfully submitted,

HOPKINS, SUTTER, HAMEL & PARK
888 Sixteenth Street, N.W.
Washington, D.C. 20006
BY: LAWRENCE F. BATES

and

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Resolution Trust Corporation, Conservator for Madison Guaranty Savings & Loan Association, by the Federal Deposit Insurance Corporation, its Managing Agent

By: /s/ Harry A. Light
GEORGE PIKE, JR.
State Bar No. 62020

HARRY A. LIGHT
State Bar No. 89222

---

[1] This action was originally commenced against Madison Guaranty Savings & Loan Association ("Madison") and Madison Financial Corporation. On February 28, 1989, the Federal Home Loan Bank Board ("FHLBB") declared Madison insolvent and appointed the Federal Savings & Loan Insurance Corporation ("FSLIC") as conservator for Madison. On August

9, 1989, President Bush signed into law the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). Pub.L. No. 101-73, 103 Stat. 183 (August 9, 1989). FIRREA provides that the RTC shall succeed the [FSLIC] as conservator or receiver with respect to an institution for which the [FSLIC] was appointed conservator or receiver during the period beginning on January 1, 1989, and ending on such date of enactment." *See* Section 501(a) (§21A(b)(6)) of FIRREA, 135 Cong. Rec. H5226 (daily ed. August 4, 1989) (to be codified at 12 U.S.C. §1441A(b)(6)). The RTC in its capacity as conservator was substituted for FSLIC as conservator for Madison in the pending action by Law or Chancery Mandate of the Court of Appeals of the State of Arkansas dated August 23, 1989. Under FIRREA, the FDIC "shall be authorized to and shall perform all responsibilities of the [RTC]." *See Id.* at 5225 (to be codified at 12 U.S.C. §1441A(b)(1)(C)).

[2] *See Id.* at 5231.

[3] Under this provision, the RTC is granted "the same powers and rights to carry out its duties – as the [FDIC] has under §§11, 12 and 13 of the Federal Deposit Insurance Act with respect to insured depository institutions . . . " *See Id.* at 5226. Under §212(a) of FIRREA, post-judgment removal power is expressly conferred upon the FDIC. *See Id.* at 5186-5187.

[4] *See Id.*

[5] *See Id.* at 5231.

CERTIFICATE OF SERVICE

A copy of the foregoing Notice has been hand delivered on this 25th day of September, 1989 to the following:

Mr. Thomas Ray
Shults, Ray & Kurrus
1600 Worthen Bank Building
Little Rock, Arkansas 72201

/s/ Harry A. Light
GEORGE PIKE, JR.
HARRY A. LIGHT

ARKANSAS COURT OF APPEALS

RESOLUTION TRUST CORPORATION, As Conservator for Madison Guaranty Savings & Loan Association and Madison Financial Corporation

APPELLANTS

VS. NO.CA 89-124

SETH WARD

APPELLEE

MOTION FOR RELEASE OF RECORD

FILED SEP 25, 1989

Appellant, Resolution Trust Corporation, as Conservator for Madison Guaranty Savings & Loan Association (the "Conservator") and Madison Financial Corporation, by its attorneys, Friday, Eldredge & Clark, files this Motion for Release of Record and in support thereof would respectfully show the Court as follows:

1.

On September 25, 1989, the conservator removed this action to the United States District Court for the Eastern District of Arkansas, Western Division, pursuant to the provisions of 12 U.S.C. § 1441A(*l*)(3), 12 U.S.C. § 1441(a)(b)(4), 12 U.S.C. § 1821(d)(13)(B) and 21 U.S.C. § 1441, *et seq.* A copy of the Notice of Removal is attached hereto as Exhibit "A".

2.

The Conservator requests that the record be released so that it can be filed with the United States District Clerk for the Eastern District of Arkansas for further proceedings in the case as removed.

WHEREFORE, premises considered, Appellant Resolution Trust Corporation as Conservator for Madison Guaranty Savings & Loan Association and Madison Financial Corporation respectfully requests that the Court release the record to Appellant so that it may be filed with the United States District Clerk for the Eastern District of Arkansas.

Respectfully submitted,

HOPKINS, SUTTER, HAMEL & PARK
888 16th Street, N.W.
Washington, D.C. 20006
By: Lawrence F. Bates

and

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Resolution Trust Corporation as Conservator for Madison Guaranty Savings & Loan Association, By The Federal Deposit Insurance Corporation, Its Managing Agent

By: _____
George Pike, Jr.
State Bar No. 62020

/s/ Harry A. Light
Harry A. Light
State Bar No. 89222

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Release of Record has been hand-delivered on this 25th Day of September, 1989 to the following:

Mr. Thomas Ray

Shults, Ray & Kurrus

1600 Worthen Bank Bldg.

Little Rock, AR 72201

/s/ Harry A. Light
Harry A. Light

IN THE ARKANSAS COURT OF APPEALS

RESOLUTION TRUST CORPORATION,
As Conservator for Madision
Guaranty Savings and Loan Association, and
MADISION FINANCIAL CORPORATION

APPELLANTS

NO. CA 89-124

VS.

SETH WARD

APPELLEE

RESPONSE TO MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT AND MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF

COMES NOW the Resolution Trust Corporation ("RTC") in its capacity as Conservator for Madison Guaranty Savings and Loan Association ("Madison") and Madison Financial Corporation and files its Response to Motion to Dismiss Appeal or Affirm Judgment and Memorandum of Authorities in Support Thereof and in support thereof would respectfully show the Court as follows:

A. *Appellee's Motion to Dismiss Appeal or Affirm Judgment ("Motion to Dismiss") fails to state any substantive basis for granting the motion.*

Appellee's Motion is a mere rhetorical attack on the RTC's removal of this case to the United States District Court, Eastern District of Arkansas, Western Division. Appellee has obviously adopted this strategy to avoid dealing with the substantive issues. Appellee omits the

key statutory basis and procedural developments justifying the RTC's removal of this case. The following is a brief summary of these events:

1. On March 2, 1989, the Federal Home Loan Bank Board declared Madison insolvent and appointed the Federal Savings & Loan Insurance Corporation ("FSLIC") as Conservator.

2. On March 10, 1989, FSLIC in its capacity as Conservator removed this action to the United States District Court, Eastern District of Arkansas, Western Division (Civil Action No. LR C-89-180) under the provisions of 12 U.S.C. §1730(k)(1) and 28 U.S.C. §1441, *et seq.*

3. On April 10, 1989, the District Court remanded the case back to this Court. FSLIC as Conservator appealed the remand order and additionally sought a Writ of Mandamus from the Eighth Circuit Court of Appeals. The issue before the Eighth Circuit was whether it had subject matter jurisdiction to review a remand order under the provisions of 12 U.S.C. §1730(k)(1). The Eighth Circuit held that it did not have subject matter jurisdiction to review the remand order or issue a Writ of Mandamus under 28 U.S.C. §1447(d). However, the Court found the case to be one of first impression and noted a split among other circuit courts of appeals that had considered the issue. *See, In re Federal Savings and Loan Insurance Corporation, et al,* Nos. 89-1961, 89-1980, slip op. (8th Cir. August 7, 1989).

4. On August 9, 1989, President Bush signed into law the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). Pub. L. No. 101-73, 103 Stat. 183 (August 9, 1989). FIRREA created the RTC

and provides that "the RTC shall succeed the FSLIC as conservator/receiver with respect to any institution for which the FSLIC was appointed conservator/receiver during the period beginning on January 1, 1989, and ending on the date of enactment". *See*, Section 501(a), 135 Cong. Rec. H 5226 (daily ed. August 4, 1989) (to be codified at 12 U.S.C. §1441A(b)(6)). RTC was subsequently substituted as a party in this action under the provisions of FIRREA.

5. Based upon the fact that FIRREA expressly grants appellate courts the right to review remand decisions, the RTC filed a petition for rehearing with the Eighth Circuit on August 18, 1989.[1] *See* §501(1)(3), 135 Cong. Rec. H5231 (daily ed. August 4, 1989) (to be codified at 12 U.S.C. §1441A(1)(3)). On September 7, 1989, the Eighth Circuit, implicitly recognizing that the RTC's Petition was not frivolous (as contended by the Appellee), requested that Appellee respond to the petition for Rehearing under Rule 40(a) of the Federal Rules of Appellate Procedure. That Petition is presently under consideration by the Eighth Circuit.

6. Under Section 501(a) and Section 212(a) of FIRREA, the RTC is granted express removal powers including the right to remove to federal court any case in which there is an appealable judgment. *See*, Section 501(a), 135 Cong. Rec. H5226 (to be codified at 12 U.S.C.

---

[1] One court that has considered the issue has found FIRREA to be retroactive. *See Triland Holdings & Co. vs. Sunbelt Service Corp.*, Nos. 89-1026, 89-1100, 87-1349 and 87-2955, slip op. (5th Cir. Sept. 22, 1989) (A copy of which is attached as Exhibit A).

§1441A(b)(4)) and Section 212(a), 135 Cong. Rec. 5186-5187 (amending 12 U.S.C. §1821(d)(13)(B)). In light of the special removal provisions now applicable to the RTC under FIRREA, the Conservator removed this action from this Court on September 25, 1989, pursuant to 12 U.S.C. §1441A(1)(3), 12 U.S.C. §1441A(b)(4), 12 U.S.C. §1821(d)(13)(b) and 28 U.S.C. §1441, *et seq.*

B. *28 U.S.C. §1446(d) operates as a statutory stay of any further proceedings in this Court as of September 25, 1989.*

A denial of the Motion to Dismiss is mandated by the provisions of 28 U.S.C. §1446(d). These provisions clearly provide that the state court cannot proceed after a notice of removal failed with the clerk of the state court:

> Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal *and the State court shall proceed no further unless and until the case is remanded.*

28 U.S.C. §1446(d) (1989) (emphasis added).[2]

The effect of the filing of the Notice of Removal with the state court has been uniformly interpreted as automatically divesting jurisdiction of that court to proceed any further in the action and to immediately vest the

---

[2] Section 501(a) (§21A(a)(3)) provides that the RTC can remove an action without bond or security. *See,* Section 501 (a) of FIRREA, 135 Cong. Rec. at H 5231 (to be codified at 12 U.S.C. §1441A(1)(3)).

Federal court to which the action was removed with jurisdiction. *Nat. Steamship Co. vs. Tugman*, 106 U.S. 118 (1882); *E.D. Systems Corp. vs. Southwestern Bell Tel.*, 674 F.2d 453 (5th Cir. 1982); *Halter vs. National Farmers Union Property & Casualty Company*, 502 F.Supp. 736 (E.D. Ark. 1980); *First National Bank vs. Johnson & Johnson*, 455 F.Supp. 361 (E.D. Ark. 1978). The statutory stay and attachment of federal jurisdiction is not dependent on the perceived merit of the propriety of the removal. *Id.* Any action taken by the state court after filing of the Notice of Removal with the state court would have no legal effect. *Hyde Park Partners, L.P. vs. Connolly*, 839 F.2d 837, 842 (1st Cir. 1988)

WHEREFORE, PREMISES CONSIDERED, Appellants, Resolution Trust Corporation, as Conservator for Madison Guaranty Savings and Loan Association and Madison Financial Corporation pray that this Court deny Appellee's Motion to Dismiss Appeal or Affirm Judgment and that the Conservator and Madison Financial Corporation be granted such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

HOPKINS, SUTTER, HAMEL & PARK
888 16th Street N.W.
Washington, D.C. 20006

FRIDAY, ELDREDGE & CLARK
2000 First commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

By: /s/ Harry A. Light
HARRY A. LIGHT
State Bar No. 89222

ATTORNEYS FOR APPELLANTS,
RESOLUTION TRUST
CORPORATION AS CONSERVATOR
FOR MADISON GUARANTY
SAVINGS AND LOAN
ASSOCIATION AND MADISION
FINANCIAL CORPORATION

CERTIFICATE OF SERVICE

I, Harry A. Light, certify that a copy of the foregoing Response to Motion to Dismiss Appeal and Affirm judgment has been mailed on this 13th day of October, 1989 by regular mail to Mr. Thomas Ray, SHULTS, RAY and KURRUS, 1600 Worthen Bank Building, Little Arkansas 72201.

/s/ Harry A. Light
HARRY A. LIGHT

NOT DESIGNATED FOR PUBLICATION
SEE REVISED SUPREME COURT RULE 21.

ARKANSAS COURT OF APPEALS

No. CA 89-124

RESOLUTION TRUST CORPORATION, As Conservator for Madison Guaranty Savings and Loan Association, and MADISON FINANCIAL CORPORATION, APPELLANTS v. SETH WARD, APPELLEE	Opinion Delivered October 25, 1989 APPELLANTS' MOTION TO RELEASE RECORD DENIED APPEAL DISMISSED

PER CURIAM

By per curiam order of August 16, 1989, we denied appellee's motion to dismiss this appeal and granted appellants' motion for a forty-five-day extension of time to file their briefs herein, stating that no further motions for extension of time would be entertained. As no brief has been filed within the time specified in the per curiam order, the appeal is hereby dismissed pursuant to Rule 10 of the Rules of the Arkansas Supreme Court and Court of Appeals.

Appellants' motion for release of the record to the United States District Court, to which removal of this case has been sought, is denied until such time as this court receives a proper request or order from that court.

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS, SS.
In the Court of Appeals

BE IT REMEMBERED, That at a session of the Court of Appeals of the State of Arkansas, begun and held in the City of Little Rock, on the 25th day of October 1989, amongst others were the following proceeding, to-wit:

RESOLUTION TRUST CORPORATION, AS CONSERVATOR FOR MADISON
APPELLANT

GUARANTY SAVINGS & LOAN ASSOC.
vs. No. CA89-124

SETH WARD
APPELLEE

Appeal from Pulaski Circuit Court
Second District
(Circuit Court No. 87-7580)

Appellants' motion for release of record is denied. See per curiam this date.

Appellee's motion to dismiss appeal or affirm judgment is granted. See per curiam this date.

IN TESTIMONY, That the above is a true copy of the order of said Court of Appeals, rendered in the case therein stated, I, LESLIE W. STEEN, Clerk of said Court of Appeals, hereunto set my hand

and affix the Seal of said Court of Appeals, at my office in the City of Little Rock, this 25th day of October, A.D. 1989.

/s/ Leslie W. Steen
CLERK

By _____
D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SETH WARD, Plaintiff, v. RESOLUTION TRUST CORPORATION, as Conservator for Madison Guaranty Savings and Loan Association, and MADISON FINANCIAL CORPORATION, Defendants.	)	No. LR-C-89-807 (Formerly Arkansas Court of Appeals No. CA 89-124)

EMERGENCY MOTION TO ENFORCE STAY OF PROCEEDINGS

COMES NOW the Resolution Trust Corporation, as Conservator for Madison Guaranty Savings & Loan Association and Madison Financial Corporation pursuant to 28 U.S.C. §1446(d) and Rule 11 of the Federal Rules of Civil Procedure and file this Emergency Motion to Enforce Stay of Proceedings and in support thereof would respectfully show the Court as follows:

1.

On September 25, 1989, this action was removed to this Court from the Arkansas Court of Appeals. A copy of the Notice of Removal was filed with the Clerk of the Arkansas Court of Appeals and served upon Plaintiff's counsel on September 25, 1989. A copy of the Notice of Removal showing the receipt by the Clerk of the

Arkansas Court of Appeals is attached hereto as *Exhibit "A"* and incorporated herein by reference. Based on the foregoing, an automatic stay of any further proceedings in the Arkansas Court of Appeals was effected pursuant to 28 U.S.C. §1446(d).

2.

In disregard of the automatic stay, on October 3, 1989, counsel for Plaintiff filed a Motion to Dismiss the appeal previously pending in the Arkansas Court of Appeals. A copy of Plaintiff's Motion is attached hereto as *Exhibit "B"* and incorporated herein by reference.

3.

On October 13, 1989, Defendants filed a Response to Plaintiff's Motion to Dismiss unequivocally pointing out that the filing of the Motion was in violation of 28 U.S.C. §1446(d), that the Arkansas Court of Appeals no longer had jurisdiction over this case and that any action taken by the Arkansas Court of Appeals would be without legal effect. A copy of Defendants' response is attached hereto as *Exhibit "C"* and incorporated herein by reference. On October 25, 1989, the Arkansas Court of Appeals apparently misunderstanding the impact of 28 U.S.C. §1446(d) entered an Order and Mandate dismissing the appeal. A copy of the Order and Mandate is attached hereto as *Exhibit "D"* and incorporated herein by reference.

4.

On October 23, 1989, counsel for Plaintiff was informed by this Court that in light of the decision of the Eighth Circuit Court of Appeals to hear Defendants' appeal of the previous remand order entered by this Court, any further action in this case would be stayed pending a decision by the Eighth Circuit. A copy of a letter from Plaintiff's counsel to this Court indicating his awareness of the stay is attached hereto as *Exhibit "E"* and incorporated herein by reference. An Order staying any further proceedings in this case was entered by this Court on October 25, 1989.

5.

On October 26, 1989, again in disregard of the automatic stay set forth in 28 U.S.C. §1446(d) and in direct violation of this Court's Order of October 25, 1989, counsel for Plaintiff sent a copy of the void order of the Arkansas Court of Appeals to Worthen Bank & Trust Company, N.A. ("Escrow Agent"), the Escrow Agent under an Escrow Agreement entered into in lieu of a supersedeas bond, and requested the Escrow Agent to disburse the escrow funds to Plaintiff. The Escrow Agent complied with the request and released the funds to Plaintiff. The foregoing Escrow Agreement was incorporated into a Supersedeas Order entered by the state trial court. A copy of the Supersedeas Order (with the Escrow Agreement attached) is attached hereto as *Exhibit "F"* and incorporated herein by reference.

6.

In light of this Court's exclusive jurisdiction over this matter effective September 25, 1989 and the automatic stay provided by 28 U.S.C. §1446(d), the conduct of Plaintiff and his counsel in filing a Motion to Dismiss the appeal previously pending in the Arkansas Court of Appeals was not warranted by existing law and was interposed for improper purposes thus requiring sanctions under Rule 11 of the Federal Rules of Civil Procedure. In addition, the Order and Mandate obtained from the Arkansas Court of Appeals by the improper pleading was null and void and should be vacated.

7.

Pursuant to 28 U.S.C. §1446(d), Defendants are also entitled to an Order from this Court, requiring Plaintiff to redeposit the funds improperly obtained with the Escrow Agent to be held by the Escrow Agent subject to further orders of this Court and preventing Plaintiff and his counsel from taking any further action in the state court proceedings or in furtherance of any action previously taken by the state court including, without limitation, any attempt to obtain a release of the funds held in escrow.[1]

---

[1] In the present Motion, Defendants are only asking this Court to restore the escrow funds. It should be noted, however, that in light of §§501(a) and 212(a) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P.L. 101-73, 101 Stat. 183 (August 9, 1989), the Resolution Trust Corporation ("RTC") is not required to post bond to pursue appellate rights and is thus entitled to have the Escrow Agreement declared void and have the escrow funds returned to the

8.

On October 27, 1989, upon learning of Plaintiff's actions, counsel for Defendants immediately contacted Plaintiff's attorney and requested that the funds be redeposited. Plaintiff's counsel refused to comply with such request. By letter dated October 28, 1989, counsel for Plaintiff was notified of Defendants' request that this matter be heard by this Court. A copy of the letter hand-delivered to Plaintiff's counsel on October 28, 1989 is attached hereto as *Exhibit "G"* and incorporated herein by reference.

WHEREFORE, PREMISES CONSIDERED, Defendants request that this case be reopened and that this motion be heard by the Court on an emergency basis, that an Order immediately be issued preventing Plaintiff and his counsel from using, disposing of or otherwise removing from the jurisdiction of this Court, the funds improperly obtained from the Escrow Agent, that this Court enter an Order requiring Plaintiff to immediately return the funds obtained to the Escrow Agent and preventing Plaintiff and his attorneys from taking any further action in the state court proceedings or in furtherance of any action previously taken by the state court including, without limitation, any attempt to obtain a release of the funds held in escrow, that the Order and Mandate of the Arkansas Court of Appeals dismissing Defendants'

RTC. *See*, §501(a) of FIRREA, 135 Cong. Record H5226 (daily ed. August 4, 1989) (to be codified at 12 U.S.C. §1441A(b)(4)) and §212(a) of FIRREA, 135 Cong. Rec. H5186-5187 (daily ed. August 4, 1989) (to be codified at 12 U.S.C. §1821(d)(3)(B)). The RTC does not waive such right and reserves its right to later seek such relief.

appeal be vacated, that sanctions be imposed on Plaintiff and his counsel pursuant to Rule 11, such sanctions to include the costs and reasonable attorneys' fees incurred by Defendants in obtaining the relief requested herein and that Defendants have such other and further relief to which they may be justly entitled.

Respectfully submitted,

Lawrence F. Bates
Dennis S. Klein
Teresa E. Antonacci
Ralph Casale
HOPKINS, SUTTER, HAMEL & PARK
888 Sixteenth Street N.W.
Washington, D.C. 20006
(202) 835-8080

And

George Pike, Jr.
Harry A. Light
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2001

BY: /s/ Harry A. Light
HARRY A. LIGHT
(State Bar No. 89222)

Attorneys for Resolution Trust Corporation as Conservator for Madison Guaranty Savings & Loan
Association and Madison Financial Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SETH WARD, Plaintiff, v. RESOLUTION TRUST CORPORATION, as Conservator for Madison Guaranty Savings and Loan Association, and MADISON FINANCIAL CORPORATION, Defendants,	*	Docket No. LR-C-89-807 Little Rock, Arkansas October 31, 1989

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STEPHEN M. REASONER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

Shults, Ray & Kurrus
By: THOMAS RAY, ESQ.
1600 Worthen Bank Building
Little Rock, Arkansas 72201

For the Defendant:

Hopkins, Sutter, Hamel & Park
By: DENNIS S. KLEIN, ESQ.
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Friday, Eldredge & Clark
By: GEORGE E. PIKE, ESQ. and
HARRY A. LIGHT, ESQ.
2000 First Commercial Bank bldg.
Little Rock, Arkansas 72201

Also Present:

ALSTON JENNINGS, ESQ.

Court Reporter

Eugenie M. Power
600 West Capitol, Room 536
Little Rock, Arkansas 72201

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[p. 53] were to that record. I said I assume they were attached to the Federal Court pleadings, and apparently in the course of copying we didn't pick up the copies. Tom was out there, the next time he was out there to see if he would let us borrow it to get the exhibits out of the record. We didn't have a complete file in this court. He didn't have one and I didn't have one. So what we were looking to do was trying to get the exhibits out. So I called Leslie Steen and asked him if we could get the exhibits, and he said, "No, not without an Order". We were trying to get a complete record. Tom had gone out there, bless his heart, and got the record, borrowed it, took it to Kinko's and got the copies we needed and it became moot at that point. We didn't need it.

MR. RAY: That is absolutely not correct. That is absolutely not correct.

THE COURT: I'm not going to decide this case on the basis of that.

MR. JENNINGS: May I say one word? At the time that this Escrow Agreement was entered into, there had been a Notice of Appeal filed in the Circuit Court appealing this case to the Court of Appeals of the State of Arkansas. If that word appeal in there had been interpreted to mean anything other than the appeal that was pending to the Court of Appeals of the State of Arkansas, that Escrow Agreement never would have been executed and we would have collected on our garnishments.

THE COURT: All right. I'm going to continue on what my [p. 54] rulings were. It doesn't have anything to do with any of that. While I expressed what I said about my questions about those points, that is not going to be the reason I'm going to rule the way I'm going to rule.

Well, first of all, to make the record clear, I find that not only did Mr. Ray certainly not act fraudulently, apparently he didn't act at all in regard to this. To the extent Mr. Jennings acted, there was nothing fraudulent about that. I believe, and I'll be willing to chalk it up to an overzealousness of attempting to represent a position, that allegations were made in the pleadings, specifically the memorandum of law in support of this emergency motion, that simply did not have the investigation that's required by Rule 11.

In any event, despite – even beyond Rule 11, I think what is being asked of this Court to do is to exercise what are basically inequitable powers to enjoin and to order specific affirmative acts to be done. And that being the

case, I think we simply refer back to the maxims of equity, and one of them is whoever comes into equity must do equity and come into equity with clean hands. And I think there is a failure on behalf of the RTC to do this in making the allegations, and unnecessary – completely unnecessary for the relief that was wanted, the untrue and unnecessary allegations about Mr. Ray in this case. And, therefore, because of that I declined to rule and reach the merits, and I'm going to just simply leave the Stay Order – let me say one other thing. [p. 55] It is always the intention of this Court that my order was also a housekeeping motion to simply remove the case as an active case of the docket until such time I had directions from the Court of Appeals as to what I was suppose to do. I never considered that Order as anything that tied the hands or the actions of the parties and the attorneys of anything that they wanted to do in State Court. So I also find that Mr. Ray wasn't acting in contempt of any Order that this Court entered. But, anyway, I just simply think that perhaps maybe, I think, to do my little bit, is to maybe try next time when things like this happen, there will be a little chance to think twice about things, and especially if it involves making charges and allegations about another lawyer. This matter could have been presented to the Court simply as a matter of no jurisdiction, violation of the Escrow Agreement. It wouldn't have had to involve any of that sort of thing at all, just a simple matter on the merits. So I'm just going to decline to reach the merits of the matter and I will deny the relief requested.

MR. KLEIN: Can I ask two questions?

THE COURT: Sure.

MR. KLEIN: First, would the Court be willing to entertain the substantive basis of what we're talking about here in the normal course of pleadings, not on an emergency basis now that we have more of the facts out in the open, but to try to determine – because I'm concerned the effect –

[p. 56] THE COURT: Why don't you file a subsequent motion. And indeed, while I expressed my opinion from what was here at this hearing today, that I think that the allegations made against Mr. Ray – and, also, I am inclined, like the parties, I'm going to ask – basically I'm going to ask you, Mr. Ray, to file a motion to give the RTC a chance to respond. I do ask the parties, please, to confine themselves on what they say was established in this record and what was before the Court today. I don't want anything new.

MR. RAY: You want me to file a response to their –

THE COURT: No. You said you orally moved for Rule 11. I also want you to include in that whether the allegations against Mr. Ray should be stricken under the rule – what rule is it, scandalous?

MS. HOPKINS: 12(f).

THE COURT: 12(f), yes. If you want to file another motion, of course, you always can, and I'm not going to sit here and decide that today. I'm not going to tell any party they can't file a motion. Just because I have a Stay Order, that doesn't mean –

MR. KLEIN: That's the other concern.

THE COURT: Any motion would have to start off with any request that this Court either temporarily or permanently set aside its Stay Order. But I'm not going to stop attorneys from filing motions.

[p. 57] MR. KLEIN: Our other concern, Your Honor, is the effect. You have not vacated the dismissal by the Arkansas Court of Appeals.

THE COURT: No.

MR. KLEIN: Is this case still pending if they have dismissed our case? That's what is confusing.

THE COURT: That wasn't an emergency matter. I guess I haven't specifically ruled on that. I'll be quite honest with you, I have some real – I guess perhaps for want of a better term, I would be described as one of those federal judges who believed in judicial restraint. I would be extremely reluctant to void an Order of the Arkansas Court of Appeals. And I, quite frankly, I did not see in the briefs that were filed, and I realize these were written over a weekend and I'll give you an opportunity to supplement that if you want to. Basically, I'll tell you, I wouldn't do that unless I felt by law I was compelled to do it. It seems to me an extreme exercise of federal powers. That has real questions of federal relationship and comity, and I, quite frankly, did not in you brief see anything that compelled me. I will give you the opportunity to supplement your brief on that, but what I'm saying is, I need to see more than what I have seen in the briefs to do what I consider a drastic action.

MR. KLEIN: I just want to make sure Your Honor does not believe that since they have dismissed

our appeal that the removal which is before this Court now is dismissed.

[p. 58] THE COURT: I certainly make no such findings. All I am finding in this case is that Mr. Ward can keep the money pending appeal because of the fact that I think that the emergency motion violated Rule 11 and also violated certain equitable principles, and I was being asked to exercise –

MR. KLEIN: I would like to make a request, too. You have tried to stress a more civil way of doing things here, and we certainly appreciate that, Your Honor, and we have had a number of pleadings filed in this court and it's obviously been a tremendous expense on the parties with all the pleadings. So we would just like to request from Mr. Ray if he would drop his Rule 11 claim against us that he's made orally here today, to try to –

THE COURT: You can discuss that with Mr. Ray. Mr. Ray probably feels this is just a little more personal than some of the previous pleadings which I think were accusing the parties of doing things.

MR. KLEIN: In light of the fact that during the proceeding we dismissed it and we will –

THE COURT: That will be up to Mr. Ray. He can either pursue it or dismiss it, depending on what he wants to do about it. We'll be in recess.

(Whereupon the hearing concluded at 12:10 p.m.)

CERTIFICATE

I, Eugenie M. Power, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of [p. 59] proceedings in the above-entitled case.

/s/ Eugenie M. Power
Eugenie M. Power,
Official Reporter
Date: 11-21-89.

IN THE ARKANSAS COURT OF APPEALS

RESOLUTION TRUST CORPORATION, As Conservator for Madison Guaranty Savings and Loan Association, and MADISON FINANCIAL CORPORATION — APPELLANTS

VS. — NO. CA 89-124

SETH WARD — APPELLEE

PETITION FOR REHEARING AND FOR RECALL OF MANDATE OR, IN THE ALTERNATE, MOTION FOR RECONSIDERATION

COMES NOW the Resolution Trust Corporation ("RTC") in its capacity as Conservator for Madison Guaranty Savings and Loan Association ("Madison") and Madison Financial Corporation, appellants, and respectfully file this Petition for Rehearing and for Recall of Mandate or, in the Alternative, Motion for Reconsideration,[1] and in

---

[1] Given the existence of exclusive federal jurisdiction over this case as of September 25, 1989, the filing of this motion is not intended as any consent by Appellants to the jurisdiction of this Court after September 25, 1989 or a waiver of Appellants' previous removal or right to assert that this Court was without jurisdiction to take any action in this matter after September 25, 1989. The sole purpose of this Motion is to enable the Court to correct the inherent error in considering and granting Appellee's Motion to Dismiss Appeal or Affirm Judgment. *See, National Steamship Co. v. Tugman,* 106 U.S. 118 (1882); *Kern v. Huidekopor,* 103 U.S. 485 (1885).

Under *Tugman,* any post-removal action taken by Appellants in this Court would not result in a waiver of their right to remove this case. *National Steamship Co. v. Tugman, supra,* at 123. Although there may be cases dealing with the waiver of the right to removal, *see, e.g., Brown v. Demco, Inc.,* 792 F.2d 478 (5th

support thereof would respectfully show the Court as follows:

I.

BACKGROUND

1. On February 28, 1989, while this appeal was pending before this court, the Federal Savings & Loan Insurance Corporation ("FSLIC") was appointed Conservator for Madison as a result of which this case was removed to the United States District Court on March 10, 1989, under 12 U.S.C. §1730(k)(1). On April 28, 1989, Appellee's Motion to Remand was granted by the District Court and the FSLIC appealed the decision to the Eighth Circuit Court of Appeals. On August 7, 1989, the Eighth Court initially decided it did not have jurisdiction to hear the appeal of the remand order. *See, In re Federal Savings & Loan Insurance Corporation*, 881 F.2d 564 (8th Cir. 1989).

2. On August 9, 1989, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") became law. Pub.L. No. 101-73, 103 Stat. 183. Based on the enactment of FIRREA, the Eighth Circuit granted the RTC's Petition for Rehearing, vacated its prior opinion and will now hear the appeal of the prior remand order. *In re Resolution Trust Corporation, et al.*, Nos. 89-1961 and 89-1980 (8th Cir. October 20, 1989).

3. On September 25, 1989, five days before Appellants' brief was due in this Court, this case was removed

---

Cir. 1986), these cases are easily distinguishable in that they deal with substantial *pre-removal* actions taken in the state court evidencing the requisite intent of voluntarily submission to the jurisdiction of the state court.

to the United States District Court for the Eastern District of Arkansas based upon the enactment of FIRREA by the RTC, the statutory real party in interest. Section 501(a) of FIRREA, 135 Cong. Rec. H5226, H5231 (daily ed. August 4, 1989) (to be codified, respectively, at 12 U.S.C. §1441A(b)(6) and 12 U.S.C. §1441A(l)). A copy of the Notice of Removal was filed with the Clerk of this Court on September 25, 1989, thereby effecting an automatic stay of any further proceedings in this Court pursuant to 28 U.S.C. §1446(d).

4. On October 3, 1989, eight days after this action was removed, Appellee filed a Motion to Dismiss the Appeal even though this Court no longer had jurisdiction over this case. On October 25, 1989, this Court granted Appellee's Motion to Dismiss the Appeal by *per curiam* Order. On the same date as the decision of this Court was rendered, the Clerk of the Court issued a Mandate setting forth the substance of the *per curiam* Order.[2]

---

[2] The issuance of the Mandate on the same date as the decision is puzzling in light of the provisions of Rule 22 (b) of the Arkansas Rules of Supreme Court which unequivocally provides "[n]o transcript of any . . . decision . . . of this Court shall be certified by the Clerk, or *mandate issued*, within 17 calender [calendar] days after the judgment is rendered without special leave of the Court or upon stipulation of counsel . . . " (emphasis added). The Court's order does not reflect that the Mandate was issued based on special leave of this Court. Additionally, the parties did not stipulate to the earlier issuance of the mandate. Moreover, Appellants have been unable to find any rule prescribing a different timetable for issuance of Mandates for *per curiam* orders.

II.

ARGUMENTS AND AUTHORITIES

Appellants recognize that a removal of a case from a state appellate court is not routinely encountered. The law is clear, however, that any action taken by a state court after removal is without legal effect. *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 (1st Cir. 1988). The foregoing conclusion is mandated by the express provisions of 28 U.S.C. §1446 (d) providing that the "state court shall proceed no further [in a removed action] unless and until the case is remanded." 28 U.S.C. §1446(d) (1989). 28 U.S.C. §1446(d) has been uniformly interpreted as automatically divesting jurisdiction of the state court to proceed any further upon the filing of the Notice of Removal and immediately vesting the federal court to which the action was removed with jurisdiction. *National Steamship Co. v. Tugman*, 106 U.S. 118 (1882); *E. D. Systems Corp. v. Southwestern Bell Tel.*, 674 F.2d 453 (5th Cir. 1982); *Halter v. National Farmers Union Property and Casualty Company*, 502 F.Supp. 736 (E.D. Ark. 1980); *First National Bank v. Johnson & Johnson*, 455 F.Supp. 361 (E.D. Ark. 1978).

As noted by Professor Wright, "[a]ny further proceedings in the state court are *coram non judice* and will be vacated." 14A C. Wright. A. Miller & G. Cooper, Federal Practice and Procedure §3737 (1985); *see also, Heniford v. American Motor Sales Corp.*, 471 F.Supp. 328 (D.S.C. 1979).

The *Heniford* case exemplifies the far reaching impact of 28 U.S.C. §1446(d). In *Heniford*, South Carolina plaintiffs brought an action against AMSC, a Delaware corporation and an individual resident of South Carolina

alleging violations of South Carolina's statutes. The case proceeded to trial and during closing arguments, the plaintiffs' attorney told the jury that they did not want a verdict against the individual South Carolina defendant. AMSC took the position that the closing argument absolving the South Carolina defendent of any liability was tantamount to consenting to his dismissal thus creating the requisite diversity of citizenship necessary for removal to federal court and immediately removed the action to federal court. The state trial court refused to abstain from any further proceedings and continued with the case which resulted in a jury verdict in the plaintiffs' favor. AMSC then filed a motion in the federal court for an order asserting the jurisdiction of that Court and enjoining any further proceedings in state court. The plaintiffs moved to dismiss the removal petition or in the alternative to remand the matter. The district court held that the argument to the jury established the prerequisite for removal diversity jurisdiction, that the removal was proper and that the removal was effective at the time the removal papers were filed with the state court. Accordingly, the Court held:

> At that time, state jurisdiction ended and any further action in state court was void. *Barrett v. Southern Ry. Co.*, 68 F.R.D. 413, 419 (D.S.C. 1975); 28 U.S.C. § 1446(e). Consequently, the verdict of the jury and further proceedings in the state court trial of this action after removal are a nullity. Since this Court had jurisdiction of the present action at the time the verdict was returned and judgment was entered, the Court sets aside the same as null and void for want of jurisdiction. *Barrett v. Southern Ry. Co., supra.*

Id. at 338.

Appellants have found no Arkansas cases dealing with the jurisdiction-divesting effect of 28 U.S.C. §1446(d). Other state courts, however, have had little problem in recognizing the impact of 28 U.S.C. § 1446(d). *See, Garden Homes, Inc. v. District of Somerville,* 146 N.E.2d 372 (Mass. 1957) (trial court's refusal to allow post-removal default judgment motion on grounds of lack of state court jurisdiction after removal upheld); *State v. Boone Circuit Court,* 86 N.E.2d 74 (Ind. 1949) (writ of prohibition issued prohibiting trial court from proceeding in pending cause after removal); *Weiser v. Bierbrouwerij, B.V.,* 430 So.2d 986 (Fla. Dist. Ct., App. 1983) (trial court's dismissal of case after removal for want of prosecution reversed with directions to reinstate case); *State v. Francis,* 134 S.E.2d 681 (N.C. 1964) (criminal conviction occurring after removal reversed); *Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co.,* 395 P.2d 477, 479 (Idaho 1964) (28 U.S.C. §1446 precludes state courts from entertaining jurisdiction or authority to proceed with an action once the procedural steps have been taken for removal). "The language of [28 U.S.C. § 1446] is too plain to require interpretation." *State v. Francis, supra,* at 682. The foregoing cases uniformly recognize that any action taken by a state court after removal and prior to remand is void.

In the case at bar, the RTC's current appeal of the United States District Court's first remand order is now before the Eighth Circuit Court of Appeals and the RTC re-removed this case on September 25, 1989, prior to the date Appellant's brief in this Court was due. Given the Eighth Circuit's consideration of the prior remand order, the clear dictate of 28 U.S.C. § 1446(d) and the federal and state cases interpreting the effect of the filing of the

Notice of Removal with the state court, the RTC respectfully requests that this Court reconsider its Order of October 25, 1989, that it vacate its Order granting Appellee's Motion to Dismiss the Appeal and that the Mandate issued by the Clerk of this Court be recalled.

Respectfully submitted,

HOPKINS, SUTTER, HAMEL & PARK
888 Sixteenth Street, N.W.
Washington, D.C. 20006

And

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

By: /s/ Harry A. Light
Harry A. Light
State Bar No. 8922

Attorneys for Appellants
Resolution Trust Corporation as
Conservator for Madison Guaranty
Savings and Loan Association and
Madison Financial Corporation

CERTIFICATE

I, Harry A. Light, certify that a copy of the foregoing Motion for Reconsideration and for Recall of Mandate has been mailed on this 13th day of November, 1989, by regular mail to Mr. Thomas Ray, Shults, Ray and Kurrus, 1600 Worthen Bank Building, Little Rock, Arkansas 72201,

that the undersigned believes there is merit to the foregoing motion and that it is not interposed for purposes of delay.

/s/ Harry A. Light
Harry A. Light

HAL/Mh

IN THE ARKANSAS COURT OF APPEALS

RESOLUTION TRUST CORPORATION, As Conservator for Madison Guaranty Savings and Loan Association, and MADISON FINANCIAL CORPORATION APPELLANTS

v.

SETH WARD APPELLEE

NO. CA 89-124

APPELLEE'S RESPONSE IN OPPOSITION TO PETITION FOR REHEARING AND FOR RECALL OF MANDATE OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION

(Filed Nov. 1, 1989)

Appellants' strangely denominated Petition for Rehearing not only fails to comply with the threshold requirements of Rule 20(f) of the Rules of the Arkansas Supreme Court and Court of Appeals, but also seeks a rehearing on a motion to dismiss – something outside the scope of the Rules. Additionally, *all* of the arguments contained in Appellants' petition already have been presented to United States District Judge Stephen M. Reasoner during a hearing on October 31, 1989, in which he *refused* Appellants' request to vacate this Court's October 25, 1989 Per Curiam Opinion and Mandate and to enjoin any further proceeding before this Court. Although these grounds alone constitute a sufficient basis for summarily denying Appellants the requested relief, a review of applicable federal law demonstrates that their Petition for Rehearing is utterly without merit.

I.

BACKGROUND

On September 25, 1989, only five days before the fourth and final deadline established by this Court for the filing of Appellants' Abstract and Brief and thirty-two days after RTC was substituted for FSLIC, as Conservator for Madison Guaranty Savings and Loan Association, Appellants filed a second Notice of Removal of this appeal to United States District Court. Later that same day, *after* effecting the removal of this appeal to federal court, Appellants *voluntarily returned* to this Court and filed a pleading captioned "Motion for Release of Record" in which they specifically reinvoked the Court's jurisdiction by requesting it to release the original record "so that it can be filed with the United States District Court Clerk for the Eastern District of Arkansas.[1]

On October 2, 1989, the Clerks of the Arkansas Court of Appeals and United States District Court for the Eastern District of Arkansas confirmed that Appellants had *failed* to file their Abstract and Brief in either forum as required by this Court's August 15, 1989 Order.[2] Having previously obtained three extensions of the original June

---

[1] As the Court correctly noted in its October 25, 1989 Per Curiam Opinion, the proper procedure for Appellants to follow in attempting to obtain the release of the "original record" is to petition the United States District Court – not the Arkansas Court of Appeals – for an order directing the Clerk to release the record.

[2] In pertinent part, 28 U.S.C. §1450 explicitly provides that:

> All injunctions, orders, and other proceedings had in such action [in state court] prior to its removal shall

10, 1989 deadline for filing their Abstract and Brief, Appellants not only were in clear violation of this Court's August 15, 1989 Order, requiring them to file their Abstract and Brief by September 30, 1989, but also were using flagrant dilatory tactics to make a mockery of the Arkansas Rules of Appellate Procedure and the Rules of the Arkansas Supreme Court and Court of Appeals. Therefore, on October 3, 1989, Appellee filed two pleadings with this Court – the forum whose jurisdiction Appellants specifically had reinvoked eight days earlier by filing their Motion for Release of Record:

(1) Response in Opposition to Motion for Release of Record.

(2) Motion to Dismiss Appeal or Affirm Judgment based on Appellants' failure to file their Abstract and Brief as required by this Court's August 15, 1989 Order.

After Appellee filed these pleadings, Appellants made *no attempt whatsoever* to file a motion with this Court or the United States District Court seeking to stay or otherwise prevent this Court from exercising its jurisdiction to rule on Appellants' Motion for Release of Record and Appellee's Motion to Dismiss Appeal or Affirm Judgment. Rather, on October 13, 1989, Appellants filed their Response to Motion to Dismiss Appeal or

---

remain in full force and effect until dissolved or modified by the district court.

Thus, after Appellants filed their September 25, 1989 Notice of Removal, this Court's August 15, 1989 Order requiring Appellants to file their Abstract and Brief on or before September 30, 1989 remained in full force and effect for purposes of both the state and federal proceeding.

Affirm Judgment in which they argued, *inter alia*, that the motion should be denied *on the merits* due to its failure "to state any substantive basis for granting the motion." At the conclusion of their Response, Appellants specifically prayed that:

> [T]his Court [the Arkansas Court of Appeals] deny Appellee's Motion to Dismiss Appeal or Affirm Judgment and that the Conservator [RTC] and Madison Financial Corporation be granted *such other and further relief to which it may show itself justly entitled.*

[Emphasis added.] Thus, Appellants' post-removal conduct before this Court made it crystal clear that they voluntarily were reinvoking this Court's jurisdiction for purposes of having it resolve Appellants' Motion for Release of Record and Appellee's Motion to Dismiss Appeal or Affirm Judgment.

On October 25, 1989, the Court entered its Per Curiam Opinion and Mandate which properly resolved both motions on which Appellants specifically had requested a ruling from this Court.[3]

On October 30, 1989, Appellants filed a pleading captioned "Emergency Motion to Enforce Stay of Proceedings" and supporting memorandum of law in United

---

[3] Footnote 2 of Appellants' petition manifests a profound misunderstanding of the Rules of the Arkansas Supreme Court and Court of Appeals. This Court's Per Curiam Opinion dismissing the appeal pursuant to Rule 10 was a *final*, non-appealable decision under Rule 29(b). The Clerk, pursuant to the explicit authorization contained in Rule 22(a), issued the Mandate at the same time he released the Per Curiam Opinion because that decision was final.

States District Court. In this pleading, Appellants petitioned Judge Reasoner to enter an Order: (a) vacating this Court's October 25, 1989 Per Curiam Opinion and Mandate on the ground that it lacked jurisdiction under 28 U.S.C. §1446(d); and (b) staying any further proceedings before the Arkansas Court of Appeals in this matter. On October 31, 1989, after conducting a two-hour hearing, Judge Reasoner *denied* this motion and *refused* to vacate this Court's Per Curiam Opinion and Mandate.

Having failed to convince Judge Reasoner that this Court was without jurisdiction to enter the October 25, 1989 Per Curiam Opinion and Mandate dismissing this appeal, Appellants have retreated to this Court to advance the *same argument* as a ground for obtaining a rehearing or recalling the Mandate. As indicated by the subsequent analysis, Appellants clearly have waived and are estopped from asserting any right they otherwise might have to challenge the jurisdiction and authority of this Court to issue the Per Curiam Opinion and Mandate dismissing this appeal. Therefore, the Court should deny Appellants' Petition for Rehearing, Reconsideration or Recall of the Mandate.

II.

ANALYSIS

Although 28 U.S.C. §1446(d) provides that the "state court shall proceed no further [in a removed action] unless and until the case is remanded," this provision presumes that after removal to federal court the removing party does *not* voluntarily return to the state court forum and petition the state court to proceed with the

appeal; thereby waiving the otherwise exclusive jurisdiction of the federal court. Likewise, the cases cited by Appellants in their Petition for Rehearing *all* involve situations in which: (a) the *non-removing party* sought to reinvoke the jurisdiction of the state court after removal and the removing party responded by filing a timely motion to enjoin the state court from proceeding further; or (b) the removing party was forced to proceed *involuntarily* in state court after removing the case to federal court.[4] Thus, none of these decisions have any relevance to the instant case in which Appellants, by their voluntary post-removal conduct, specifically reinvested this Court with jurisdiction to resolve the aforementioned motions.

It is black letter law that a party may waive his right to remove a case to federal court by voluntarily submitting to the jurisdiction of the state court. *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986) ("Even a defendant whose petition [for removal] is timely may have waived its right to remove by proceeding to defend the action in

---

[4] For example, in *Henniford*, the removing defendant was *forced* to proceed with the trial in state court after the judge refused to stop the trial during closing arguments based on the statement by counsel for the removing defendant that the case was being removed to federal court because plaintiff's counsel had advised the jury that his client no longer was seeking a verdict against the resident defendant. Obviously, counsel for the removing defendant had *no choice* but to proceed with his closing argument after this ruling since time constraints made it impossible for him to seek and obtain injunctive relief before the jury returned with their verdict. Obviously, the manifest procedural distinctions between *Henniford* and this case make the Court's holding in *Henniford* inapposite.

state court or otherwise invoking the process of that Court"); *Bolivar Sand Co., Inc. v. Allied Equipment, Inc.*, 631 F.Supp. 171, 172 (W.D. Tenn. 1986) ("That right [of removal] may be waived, however, by acts taken subsequent to the creation of the right that indicate a submission to the jurisdiction of the state court"); *Chicago Title & Trust Co. v. Whitney Stores, Inc.*, 583 F.Supp. 575, 577 (N.D. Ill. 1984) ("Whitney has acted in a manner inconsistent with its intent to seek federal jurisdiction. In so doing, it has assented to the jurisdiction of the state court. That renders the removal improvident. . . . Accordingly, CT&T's motion to remand is granted"); *Baldwin v. Purdue, Inc.*, 451 F.Supp. 373, 375-76 (E.D. Va. 1978) ("It follows from the above that defendant Purdue has affirmatively, by its own voluntary act, submitted to the jurisdiction of the Circuit Court of King William County, Virginia, thereby waiving its right to remove").

Shortly *after* Appellants removed this case to federal court, they indisputably *returned* to this Court and voluntarily submitted themselves to its jurisdiction by affirmatively petitioning the Court to release the original record and, subsequently, praying that the Court enter an order denying Appellee's motion to dismiss and granting Appellants "such other and further relief to which it may show itself justly entitled." Obviously, Appellants were hoping that this Court would resolve those motions in their favor, and, unquestionably, had the Court done so, Appellants would have attempted to use the denial of Appellee's Motion to Dismiss Appeal or Affirm Judgment to defeat any effort by Appellee to raise Appellants' failure to file their Abstract and Brief as a grounds for dismissing the appeal in United States District Court

pursuant to 28 U.S.C. §1450. However, after losing on those two motions, Appellants suddenly have taken the position that this Court should not have reached the merits of motions that Appellants *specifically requested* it to decide. Aside from being preposterous on its face, this position is legally indefensible.

In *Rosenthal v. Coates*, 148 U.S. 142, 147-48 (1892), the United States Supreme Court first articulated the principle that the removal statutes do *not* contemplate that a party may "experiment" on his case in the state court and, upon an adverse decision, seek refuge in federal court:

> Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on its case in the state court, and, upon an adverse decision, then transfer it to the federal court. Here Rosenthal has gone through the state trial and appellate courts, and his right has been finally declared by the Supreme Court of the state; and as yet no formal decree has been entered in the trial court, it is nonetheless true that he has experimented with the state courts and been beaten, and now seeks a different forum.

Accord: *Aynesworth v. Beech Aircraft Corporation*, 604 F.Supp. 630, 637 (W.D. Tex. 1985) ("The right to remove pending litigation to federal court is an important right but it can be waived. A defendant simply cannot . . . 'experiment on its case in the state court,' and, upon an adverse decision, then transfer it to the federal court"); *Kiddie Rides U.S.A., Inc. v. Electro-Mobiltechnik*, 579 F.Supp. 1476, 1480 (C.D. Ill. 1984) ("However, the

defendant may not, after having argued and lost an issue in state court, remove the action to federal court for what is in effect an appeal of the adverse decision").

If the removing party's "experimentation" with his case in state court *prior* to removal can give rise to a waiver of his right to remove, *a fortiori*, the removing party's voluntary "experimentation" with his case in state court *after* removal also gives rise to a waiver of his right to challenge the jurisdiction and authority of the state court to enter the order that formed the subject matter of the removing party's experiment. By returning to this Court *after* filing their second Notice of Removal, petitioning this Court to release the original record, responding on the merits to Appellee's subsequent Motion to Dismiss or Affirm the Judgment, and affirmatively praying for this Court to enter an order denying the motion to dismiss and granting Appellants "such other and further relief to which it may show itself justly entitled," Appellants clearly have waived and are estopped from asserting any right they otherwise might have to challenge the jurisdiction or authority of this Court to enter the Per Curiam Opinion and Mandate dismissing this appeal.

III.

CONCLUSION

Appellants, the removing parties, are in the untenable position of attempting to invoke the supposedly exclusive jurisdiction of the federal court under 28 U.S.C. §1446(d) only *after* they voluntarily returned to this Court following their removal of the appeal to federal court on September 25, 1989, and *lost* on the merits in their attempt

to get this Court to enter orders granting Appellants' Motion for Release of Original Record and denying Appellee's Motion to Dismiss the appeal. Having elected to make their proverbial bed before this Court, Appellants now should be required to sleep in it.

WHEREFORE, Appellee Ward prays that the Court enter an Order denying Appellants' Petition for Rehearing, Reconsideration or Recall of Mandate and for all other just and appropriate relief.

Respectfully submitted,

SHULTS, RAY & KURRUS
1600 WORTHEN BANK BUILDING
LITTLE ROCK, ARKANSAS 72201
(501) 375-2301

By /s/ Thomas Ray
Thomas Ray
No. 76101
Attorneys for Appellee

CERTIFICATE OF SERVICE

On November 17, 1989, Appellee's Response in Opposition to Petition for Rehearing and for Recall of Mandate, or, in the Alternative, Motion for Reconsideration was served by hand delivering a copy to George E. Pike, Jr., Esq., at Friday, Eldredge & Clark, 2000 First Commercial Building, Little Rock, Arkansas 72201, and by mailing a copy to Mr. Lawrence F. Bates, Esq., Hopkins, Sutter, Hamel & Park, 888 16th Street, N.W., Washington, D.C. 20006.

/s/ Thomas Ray
Thomas Ray

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

Leslie M. Steen
Clerk

Rae M. Millerd
Deputy

November 29, 1989

Robin Horne
Chief Deputy

Greta Kibens
Deputy

Melissa Fuller
Chief Deputy

Danny Williams
Deputy

Janie Owen
Deputy

Janet Dean
Deputy

Denise Parks
Deputy

Bill McEntire
Deputy

Harry A. Light
Attorney at Law
2000 First Commercial Building
Little Rock, AR 72201

Hopkins, Sutter, Hamel & Park
Attorneys at Law
888 Sixteenth Street, N.W.
Washington, D.C. 20006

RE: CA89-124 Resolution Trust Corporation, as Conservator for Madison Guaranty Savings and Loan Association et al. v. Seth Ward

Gentlemen:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Appellants' motion for reconsideration is denied."

Sincerely yours,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:mf

cc: Thomas Ray

Supreme Court, U.S.
FILED
FEB 10 1993
OFFICE OF THE CLERK

No. 92-935

In the Supreme Court of the United States

OCTOBER TERM, 1992

SETH WARD, PETITIONER

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MADISON GUARANTY SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RICHARD T. ABOUSSIE
Acting General Counsel
JAMES M. BARKER
Assistant General Counsel
MICHAEL P. CONDON
Senior Counsel
SHEILA KRAFT BUDOFF
Senior Attorney
LINDA A. MARCUSEN
Counsel
Resolution Trust Corporation
Washington, D.C. 20434-0001

QUESTIONS PRESENTED

1. Whether an order issued by the state court of appeals after removal of the case to federal court is entitled to *res judicata* effect.

2. Whether the attempt of the Resolution Trust Corporation to raise its federal defenses after removal of the case to federal court is an impermissible collateral attack on a state-court judgment.

3. Whether the Resolution Trust Corporation may raise special defenses granted to it by federal law for the first time after a trial-court judgment if the Resolution Trust Corporation did not become a party to the case until after the trial court entered judgment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Baumann v. *Savers Federal Savings & Loan Association*, 934 F.2d 1506 (11th Cir. 1991), cert. denied, 112 S. Ct. 1936 (1992)	10, 13
D'Oench, Duhme and Co. v. *FDIC*, 315 U.S. 447 (1942)	3, 11
Durfee v. *Duke*, 375 U.S. 106 (1963)	8
FDIC v. *Hadid*, 947 F.2d 1153 (4th Cir. 1991)	12
FDIC v. *Meyerland Co. (In re Meyerland Co.)*, 960 F.2d 512 (5th Cir. 1992), cert. denied, No. 92-510 (Jan. 4, 1993)	6
FSLIC v. *Westgate Partners Ltd.*, 726 F. Supp. 807 (D. Colo. 1989), aff'd, 937 F.2d 526 (10th Cir. 1991)	6
Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981)	8
5300 Memorial Investors, Ltd. v. *RTC (In re 5300 Memorial Investors, Ltd.)*, 973 F.2d 1160 (5th Cir. 1992), cert. denied, 113 S. Ct. 459 (1992)	9, 12
Grubb v. *FDIC*, 883 F.2d 222 (10th Cir. 1987)	12
Hyde Park Partners, L.P. v. *Connolly*, 839 F.2d 837 (1st Cir. 1988)	7
Kern v. *Huidekoper*, 103 U.S. 485 (1881)	8
Larsen v. *FDIC/Manager Fund*, 835 S.W.2d 66 (Tex. 1992)	11
Lazuka v. *FDIC*, 931 F.2d 1530 (11th Cir. 1991)	6

Cases—Continued: Page

Metropolitan Casualty Co. v. *Stevens*, 312 U.S. 563 (1941) 7
Meyerland Co. v. *FDIC*, No. D-2893 (Tex. Jan. 27, 1993) 6
Northwest Land and Investment Incorporation v. *New West Federal Savings and Loan Association*, 827 P.2d 334 (Wash. Ct. App. 1992) 12
Olney Savings and Loan Association v. *Trinity Bank Savings Association*, 885 F.2d 266 (5th Cir. 1989) 11, 13
RTC, In re, 881 F.2d 564 (8th Cir. 1989) 2
RTC v. *Key*, 733 F. Supp. 1086 (N.D. Tex. 1990) 6
RTC v. *McCrory*, 951 F.2d 68 (5th Cir.), cert. denied, 113 S. Ct. 459 (1992) 10, 12
RTC v. *Westgate Partners Ltd.*, 937 F.2d 526 (10th Cir. 1991) 6
RTC v. *Winslow*, 12 Cal. Rptr. 2d 510 (Ct. App. 1992) .. 10
604 Columbus Avenue Realty Trust, In re, 968 F.2d 1332 (1st Cir. 1992) 9, 13
Steamship Co. v. *Tugman*, 106 U.S. 118 (1882) 7
Thurman v. *FDIC*, 889 F.2d 1441 (5th Cir. 1989) 11-12
Union Federal Bank v. *Minyard*, 919 F.2d 335 (5th Cir. 1990) 12
Ward v. *RTC*, 901 F.2d 694 (8th Cir. 1990) 3, 5

Statutes and rule:

Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.*:
12 U.S.C. 1441(a)(2) (Supp. II 1990) 5
12 U.S.C. 1441a(b)(6) (Supp. II 1990) 2
12 U.S.C. 1441a(*l*) 6
12 U.S.C. 1441a(*l*)(2) (Supp. II 1990) 2, 5
12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) 2, 3, 5, 6
12 U.S.C. 1441a(*l*)(3)(A) (Supp. II 1990) 6
12 U.S.C. 1441a(*l*)(3)(B) (Supp. II 1990) 6
12 U.S.C. 1821(d)(9) (Supp. II 1990) 3, 11
12 U.S.C. 1821(d)(13) (Supp. II 1990) 12

Statutes and rule—Continued: Page

12 U.S.C. 1823(e) (Supp. II 1990) 3, 11, 13
Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 501(a), 103 Stat. 307 (12 U.S.C. 1441A(B)(6) (Supp. II 1990)) 2
Resolution Trust Corporation Refinancing, Reconstruction, and Improvement Act of 1991, Pub. L. No. 102-233, § 316, 105 Stat. 1772 (12 U.S.C. 1441a(*l*)(3) (Supp. III 1991)) 5
12 U.S.C. 1730(k)(l) 2
28 U.S.C. 1441 6
28 U.S.C. 1446 6
28 U.S.C. 1446(d) 6
Fed. R. Civ. P. 60(b) 3

Miscellaneous:

Charles Alan Wright et al., *Federal Practice and Procedure*:
Vol. 14A (2d ed. 1985) 7
Vol. 18 (1981) 8

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-935

SETH WARD, PETITIONER

v.

RESOLUTION TRUST CORPORATION,
AS RECEIVER FOR MADISON GUARANTY
SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 972 F.2d 196.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on September 3, 1992. Pet. App. 13. The petition for a writ of certiorari was filed on December 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed an action in 1987 in the Circuit Court of Pulaski County, Arkansas, seeking real estate sales commissions he claimed were owed to him by Madison Guaranty Savings and Loan Association (Madison Guaranty) and Madison Financial Corporation (Madison Financial), a wholly owned subsidiary of Madison Guaranty. After a jury trial, the state trial court affirmed the existence of the commission agreement alleged by petitioner and entered judgment in his favor in September 1988. The Madison entities appealed to the Arkansas Court of Appeals. Pet. 5; Pet. App. 2a-3a, 14a-16a.

2. While the appeal was pending, the Federal Home Loan Bank Board declared Madison Guaranty insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. Pursuant to Section 501(a) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 370 (codified at 12 U.S.C. 1441a(b)(6) (Supp. II 1990)), the Resolution Trust Corporation (RTC) succeeded FSLIC as conservator on August 9, 1989 (the date FIRREA was enacted).[1] Pursuant to 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), the RTC as conservator removed the case to the United States District Court for the Eastern District of Arkansas on September 25, 1989. Pet. App. 22a-25a.[2]

---

[1] The RTC subsequently became receiver. Pet. App. 3a.

[2] FSLIC had attempted to remove the case to federal court in March 1989, pursuant to 12 U.S.C. 1730(k)(1). The federal district court rejected the removal petition and the court of appeals dismissed FSLIC's appeal of the remand order for want of jurisdiction. *In re RTC*, 881 F.2d 564 (8th Cir. 1989). After passage of FIRREA, the court of appeals granted the petition for rehearing filed by the RTC as conservator, and reinstated the appeal. The court of appeals thereafter dismissed the appeal as moot in light of

3. After it had removed the case to federal court, the RTC as conservator and Madison Financial filed a motion in the Arkansas Court of Appeals asking that court to release the original record for use in the federal court. Pet. App. 26a-28a. After petitioner objected and sought dismissal of the appeal, Madison Financial and the RTC as conservator, responded by explaining that their removal of the case to federal court divested the state court of jurisdiction. *Id.* at 29a-34a. On October 25, 1989, the state court of appeals dismissed the appeal based on the failure of the RTC and the Madison entities to file a brief on the merits of the appeal. *Id.* at 35a-37a. It did not address the jurisdictional question, but instead denied the motion seeking release of the record "until such time as this court receives a proper request or order from th[e federal district] court." *Id.* at 35a.[3]

4. Respondents (the RTC as receiver and Madison Financial) then filed a motion asking the federal district court to vacate the state trial-court judgment under Federal Rule of Civil Procedure 60(b), so that the court could consider respondents' defenses under *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1821(d)(9) and 1823(e) (Supp. II 1990). The district court denied the motion without opinion and entered judgment for petitioner in accordance with the judgment of the state trial court. Pet. App. 7a-8a.

5. The Court of Appeals for the Eighth Circuit reversed. Pet. App. 1a-6a. It first concluded that the state appellate court's order of dismissal was void because it

---

the clear propriety of the subsequent removal under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990). *Ward* v. *RTC*, 901 F.2d 694, 694-695 (8th Cir. 1990).

[3] Respondents filed a motion for reconsideration in the Arkansas Court of Appeals, but the motion was denied without opinion. Pet. App. 70a-71a.

was entered after the case was removed to federal court. *Id.* at 4a-5a. The Eighth Circuit rejected petitioner's claim that respondents were barred from challenging the order because they chose not to appeal it in the state courts, explaining that respondents "had no need to appeal the order further" because it "was void." *Id.* at 4a. The Eighth Circuit similarly rejected petitioner's claim that the order of dismissal precluded any challenge in the federal courts, reasoning that "[b]ecause the state appellate court's order dismissing the state appeal is void, the state court judgment lacks preclusive effect as a final judgment." *Id.* at 5a. Finally, the Eighth Circuit rejected petitioner's claim that respondents waived federal jurisdiction by asking the state appellate court to release the record to the federal district court. It noted that the "motion did not request a ruling on the merits of the appeal or an abandonment of federal jurisdiction," and indeed that the papers respondents filed in the state courts contended that the basis for the relief they sought was the existence of federal jurisdiction. *Ibid.*

Turning to respondents' defenses on the merits, the Eighth Circuit noted that they were not available to the Madison entities at the time of trial and that the RTC "did not become a party and had no opportunity to raise the *D'Oench* and section 1823(e) defenses until after the state trial." Pet. App. 6a. Accordingly, it concluded that respondents were entitled to raise those defenses at this time, and it remanded the case to the district court for consideration of those defenses. *Ibid.*

ARGUMENT

1. Petitioner first argues (Pet. 13-17) that the Eighth Circuit erred in declining to give preclusive effect to the decision of the Arkansas Court of Appeals dismissing respondents' appeal from the state trial court's judgment, which petitioners characterize as a ruling that the state

court had jurisdiction even after the RTC in its capacity as conservator removed the case to federal court. That claim is meritless.

First, the RTC, acting in its capacity as conservator, properly removed the case to federal court. Section 1441a(*l*)(2) of Title 12, United States Code (Supp. II 1990), provides that the "Corporation shall be substituted as a party in any civil action * * * to which its predecessor in interest was a party with respect to [certain institutions that had failed before passage of FIRREA]." Subsection (3) then provided:

> The Corporation may, without bond or security, remove any such action * * * from a State court to the United States District Court for the District of Columbia, or if the action * * * arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located.[4]

Petitioner does not dispute that Madison Guaranty was one of the institutions described in Section 1441a(*l*)(2) and that the RTC as conservator therefore was properly substituted as a party. It follows that the removal by the RTC as conservator was proper.[5] Because the removal

---

[4] Section 1441a(a)(2) (Supp. II 1990) provides that all references to the "Corporation" in Section 1441a refer to the RTC. Section 316 of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub. L. No. 102-233, 105 Stat. 1772 (codified at 12 U.S.C. 1441a(*l*)(3) (Supp. III 1991)), amended Section 1441a(*l*)(3) in respects not relevant to the issues raised by the petition.

[5] Petitioner has not asked the Court to review the propriety of the removal. Petitioner conceded the propriety of the removal before the court of appeals in proceedings concerning the first

was proper, it is clear that the state court did not have the power to proceed further in the case. 28 U.S.C. 1446(d) ("[A]fter [completion of the procedures for removal] the State court shall proceed no further unless and until the case is remanded."); see *Meyerland Company* v. *FDIC*, No. D-2893 (Tex. Jan. 27, 1993) (relying on Section 1446(d) to support vacating appellate court's dismissal of appeal as void because case was removed to federal court before dismissal).[6] The state court's later

---

removal. See *Ward* v. *RTC*, 901 F.2d 694, 694 (8th Cir. 1990).

[6] Contrary to petitioner's suggestion (Pet. 13-14), there is no reason to doubt the applicability of 28 U.S.C. 1446(d) to this case. Where the removal powers granted to the federal banking authorities under Title 12 do not address procedural questions resolved by the general removal provisions of Title 28, the courts regularly have held the general removal provisions of Title 28 applicable to cases removed by the Resolution Trust Corporation under the powers granted to it in Title 12. See, *e.g.*, *FDIC* v. *Meyerland Co.* (*In re Meyerland Co.*), 960 F.2d 512, 520-521 (5th Cir. 1992) (en banc) ("FIRREA's lack of mechanics of removal necessitates reliance on the general schema [in 28 U.S.C. 1446]."), cert. denied, No. 92-590 (Jan. 4, 1993); *Lazuka* v. *FDIC*, 931 F.2d 1530, 1536 (11th Cir. 1991) ("[FIRREA] evidence[s] Congress's intent that the FDIC adhere in most respects to general removal procedure."). Both of the cases on which petitioner relies consider whether specific provisions of 12 U.S.C. 1441a(*l*) bar the applicability of arguably conflicting provisions of Title 28. See *RTC* v. *Key*, 733 F. Supp. 1086, 1089 (N.D. Tex. 1990) (considering whether time for removal is governed by general provision set forth in 28 U.S.C. 1446(d) or provisions of 12 U.S.C. 1441a(*l*)(3)(A) and (B) (Supp. II 1990)); *FSLIC* v. *Westgate Partners Ltd.*, 726 F. Supp. 807, 809 (D. Colo. 1989) (considering whether court to which federal entity could remove case was governed by general provisions of 28 U.S.C. 1441 or 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990)), aff'd, *RTC* v. *Westgate Partners Ltd.*, 937 F.2d 526 (10th Cir. 1991). Petitioner identifies no provision of FIRREA that casts any doubt on the applicability of the rule of 28 U.S.C. 1446(d) that a state court has no authority to act after removal of a case from its jurisdiction.

dismissal of the appeal in this case therefore was void.[7]

Petitioner contends (Pet. 13-17) that even if the decision of the state court to dismiss the appeal was void, it was binding on respondents as a matter of *res judicata*; petitioner argues that when a court expressly determines a question litigated by the parties before it—even a jurisdictional question—those parties are precluded from further litigation of the question. The problem with that argument here is that the state court did not address or resolve the jurisdictional question. The only issue decided in the opinion of the state court of appeals was that the appeal should be dismissed based on respondents' failure to file briefs in accordance with the briefing schedule established by the state court, Pet. App. 35a—a schedule that itself ceased to have any significance after the case was removed to federal court.[8] Accordingly, because the state court did not actually decide the jurisdictional question, there would have been

---

[7] See, *e.g.*, *Metropolitan Casualty Insurance Co.* v. *Stevens*, 312 U.S. 563, 566 (1941) ("proceedings in the state court subsequent to the petition for removal * * * are void if the cause was removable"); *Steamship Co.* v. *Tugman*, 106 U.S. 118, 122 (1882) ("Upon [compliance with the procedures for removal] the jurisdiction of the State court absolutely ceased * * * . Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored."); *Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 842 (1st Cir. 1988); 14A Charles Alan Wright et al., *Federal Practice and Procedure* § 3737, at 551-553 (2d ed. 1985).

[8] Indeed, the second paragraph of the opinion makes it clear that the state court of appeals was not considering the propriety of the removal, because the court stated that it was refusing to release the record "until such time as this court receives a proper request or order from [the federal district] court." Pet. App. 35a. If the court had determined that its jurisdiction was proper, it would have had no reason to dispose of the motion in that manner; it presumably would have denied the motion outright.

no basis for the Eighth Circuit to find respondents precluded from further litigation of that issue. See 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4420, at 184-185 (1981) ("[I]f there is no showing as to the issues that were actually decided, there is no issue preclusion.").[9]

Moreover, petitioner's argument fails to take account of the context in which his claim of preclusion arises. Although we may assume that issue preclusion principles generally would allow one court's final judgment that incorporated the resolution of a jurisdictional question to bind another court on the same question in a different case, the ruling on which petitioner relies was made by a state court in a case that already had been removed to federal court. In that situation, there is only one lawsuit, not two, so the prerequisite for application of preclusion principles—a final and definitive resolution of the case in the state court system followed by a separate suit in federal court—is absent here. Instead, the proper mode of analysis is to ascertain what determinations had been made before the time the case was removed, and to consider whether ordinary principles of judicial efficiency justify reconsidering those determinations. Determinations purportedly made by a state court *after* removal (such as dismissal of the appeal in this case) are a nullity and may be disregarded.[10] The court of appeals properly applied those principles, and its decision therefore does not warrant review.

---

[9] Because the state court did not actually decide the jurisdictional question, petitioner's reliance (Pet. 15-17) on *Durfee* v. *Duke*, 375 U.S. 106 (1963), is misplaced.

[10] Compare *Kern* v. *Huidekoper*, 103 U.S. 485, 492-493 (1881) (trial held by state court after removal has no effect on proceedings in federal court even though removing party participated in the state court trial).

2. Petitioner also contends (Pet. 18-22) that because respondents failed to pursue appellate remedies in the Arkansas Supreme Court after the state appellate court dismissed the appeal, their motion in the federal district court to set aside the state trial court's judgment is an impermissible collateral attack that violates the *Rooker-Feldman* doctrine, as applied by this Court in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981). That contention is frivolous. As *Moitie* makes clear, the *Rooker-Feldman* doctrine prohibits relitigation in a subsequent action of issues a party lost in an earlier action. 452 U.S. at 398 ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). That principle does not apply here, because respondents have not initiated a new action in the federal district court challenging a final judgment entered by the state courts in a separate action. They have removed the same action that was filed in the state courts to federal court before entry of a final nonappealable judgment, and they seek to have set aside, in that same action, certain rulings made before the RTC became a party. Accordingly, the case does not involve a collateral attack on a final judgment, but rather unexceptional steps in a pending case to secure reconsideration of rulings respondents believe to be incorrect.

3. Finally, petitioner argues (Pet. 22-25) that the court of appeals erred in allowing respondents to assert defenses that were not raised by the Madison entities at the time of the state-court trial, before the RTC became a party. In cases where the RTC and the FDIC have special federal-law defenses that were not available to a failed institution at the time of trial (because the federal entity became a party to the case after the trial), the courts consistently have allowed the federal entity to

raise such defenses for the first time on appeal. See, *e.g.*, *In re 604 Columbus Avenue Realty Trust*, 968 F.2d 1332, 1342-1344 (1st Cir. 1992) ("[I]t would have been unfair to prevent the FDIC from raising its federal defenses when it had no such opportunity to assert them before the bankruptcy court."); *5300 Memorial Investors, Ltd.* v. *RTC* (*In re 5300 Memorial Investors, Ltd.*), 973 F.2d 1160, 1163-1164 (5th Cir. 1992); *RTC* v. *McCrory*, 951 F.2d 68, 71 (5th Cir.) ("[T]he federal regulator had no opportunity to raise its special defense in the trial court, and * * * it should not be penalized on appeal for that lack of opportunity."), cert. denied, 113 S. Ct. 459 (1992); *Baumann* v. *Savers Federal Savings & Loan Association*, 934 F.2d 1506, 1512-1513 (11th Cir. 1991) ("RTC * * * should not be penalized for not raising a defense it had no opportunity to present."), cert. denied, 112 S. Ct. 1936 (1992); see also *RTC* v. *Winslow*, 12 Cal. Rptr. 2d 510, 516-517 (Ct. App. 1992).

Petitioner argues (Pet. 24-25) that it would be unfair to allow respondents to raise their claims at this time, because the relevant books and records have been dispersed or because FSLIC was supervising Madison Guaranty at the time of the state-court trial (before the institution failed and FSLIC became its conservator). Those arguments are meritless. First, the record in this case establishes that the commission agreement was not in the official books and records of Madison Guaranty, was never considered or approved by the Board of Directors, and was not executed on the date the parties allegedly agreed to it. C.A. App. 35, 61-62, 96-97, 131-132. Because those facts are adequate to establish the elements necessary to respondents' defenses, any arguable difficulties in obtaining complete records do not establish a sufficient element of unfairness to require the court to refrain from adjudicating those defenses.

Second, FSLIC's informal supervision of Madison Guaranty would not have allowed Madison Guaranty to assert the defenses on which respondents rely in this case; those defenses do not protect entities for which no receiver or conservator has been appointed. See 12 U.S.C. 1821(d)(9) and 1823(e) (Supp. II 1990); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 459-461 (1942). FSLIC was not a party to the litigation at the time of the trial and thus had no power to raise these defenses. Hence, the existence of FSLIC's prior supervision does not affect the RTC's ability to raise the defenses after it became conservator and then receiver of Madison Guaranty.

Petitioner also errs in claiming (Pet. 22) that the courts of appeals have reached inconsistent results in this area. None of the decisions he cites is inconsistent with the rule described above. In *Olney Savings and Loan Association* v. *Trinity Banc Savings Association*, 885 F.2d 266 (5th Cir. 1989), the FDIC attempted to press a *D'Oench, Duhme* claim to protect an asset (a participation agreement) that a trial court had rescinded before the FDIC became a party, based on misrepresentations that the FDIC characterized as unrecorded side agreements. *Id.* at 274. Because the trial court had rescinded the agreement before the FDIC took over the institution that owned the agreement, the court of appeals reasoned that the FDIC never acquired the asset and thus ruled that the FDIC's federal defenses could not apply with respect to that agreement. *Id.* at 275. That reasoning, whatever its merits, is not inconsistent with the decision of the court of appeals in this case.

The other federal appellate decisions on which petitioner relies are even further afield.[11] *Thurman* v.

---

[11] The two state-court decisions on which petitioner relies are also unhelpful to his position. In *Larsen* v. *FDIC/Manager Fund*, 835 S.W.2d 66 (Tex. 1992), the Texas Supreme Court concluded as

FDIC, 889 F.2d 1441, 1447 (5th Cir. 1989), declined to accept post-judgment defenses that would not have changed the outcome of the trial court's decision; the defenses in this case would have resulted in judgment for the defendant.[12] *Grubb* v. *FDIC*, 833 F.2d 222, 225-226 (10th Cir. 1987), held only that supersedeas bonds posted to secure a stay of execution are not assets of a receiver on whose behalf special federal law defenses may be asserted; it did not address the ability of the FDIC to press such defenses with respect to claims that would reduce the assets of the estate of the failed institution. Finally, in *FDIC* v. *Hadid*, 947 F.2d 1153, 1157 (4th Cir. 1991), the court in fact upheld the assertion of a *D'Oench, Duhme* defense for the first time on appeal in a case in which the FDIC succeeded to the bank's interest in a judgment in the bank's favor.[13]

---

a matter of state law that state procedural rules would not permit a party to raise on appeal claims that were not raised at trial. *Id.* at 74. The court in *Northwest Land & Investment, Inc.* v. *New West Federal Savings and Loan Association*, 827 P.2d 334 (Wash. Ct. App. 1992), declined to allow a party to raise new defenses on remand that it failed to raise during an appeal to which it was a party. *Id.* at 337-338. In this case, the RTC raised its defenses in its capacity as receiver at its first opportunity in the district court.

[12] In any event, the Fifth Circuit's decisions in *5300 Memorial, supra*; *McCrory, supra*; and *Union Federal Bank* v. *Minyard*, 919 F.2d 335, 336 (5th Cir. 1990), make it clear that the Fifth Circuit follows a rule consistent with the decision of the Eighth Circuit in this case.

[13] Because the Eighth Circuit allowed respondents to raise their defenses based on general principles of federal law, it had no occasion to consider respondents' argument that 12 U.S.C. 1821(d)(13) (Supp. II 1990) grants respondents an express right to do so. That provision grants the RTC as conservator or receiver "all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity." The RTC, acting

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

RICHARD T. ABOUSSIE
Acting General Counsel
JAMES M. BARKER
Assistant General Counsel
MICHAEL P. CONDON
Senior Counsel
SHEILA KRAFT BUDOFF
Senior Attorney
LINDA A. MARCUSEN
Counsel
Resolution Trust Corporation

FEBRUARY 1993

---

in its capacity as receiver, argued below that because rights under *D'Oench, Duhme* and Section 1823(e) are among "the rights and remedies available to the corporation in its corporate capacity," it may raise those arguments whenever it enters a case before the entry of an unappealable final judgment. At least three courts of appeals, however, have rejected that argument. See *604 Columbus Avenue*, 968 F.2d at 1342-1343; *Baumann*, 934 F.2d at 1511-1512; *Olney*, 885 F.2d at 275.

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

No. 92-935

In The

Supreme Court of the United States

October Term, 1992

SETH WARD,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MADISON GUARANTY SAVINGS AND LOAN ASSOCIATION AND MADISON FINANCIAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

THOMAS RAY
SHULTS, RAY & KURRUS
200 West Capitol, Suite 1600
Little Rock, Arkansas 72201-3637
(501) 375-2301

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ARGUMENT

I.

Respondents' argument in support of the Eighth Circuit's dangerously flawed analysis of *res judicata* is predicated entirely on the false premise "that the state court did not address or resolve the jurisdictional question." Respondents' Brief at 7. To create the illusion that the record in this case supports that false premise, Respondents' statement of the case provides an incomplete and factually erroneous characterization of the events and issues that led the Arkansas Court of Appeals, *on two separate occasions*, to fully and fairly adjudicate the "jurisdictional question" in the context of deciding Ward's motion to dismiss the appeal.

First, Respondents' state that their response to Ward's motion to dismiss the appeal was limited to "explaining [to the Arkansas Court of Appeals] that their removal of the case to federal court divested the state court of jurisdiction." Respondents' Brief at 3. In fact, subheading "A" of Respondents' response was captioned "Appellee's [Ward's] Motion to Dismiss Appeal or Affirm Judgment Fails to State Any Substantive Basis for Granting the Motion." Pet. App. 29a. Under that subheading, Respondents argued that the Arkansas Court of Appeals should assume subject matter jurisdiction over the proceeding for purposes of *denying on the merits* Ward's motion to dismiss. *Id.* at 29a-32a. Subheading "B" of their response was captioned "28 U.S.C. §1446(d) Operates As a Statutory Stay of Any Further Proceedings in This Court As Of September 25, 1989" and set forth the *alternative argument* that the state court lacked subject matter jurisdiction over the proceeding. *Id.* at 32a. Nevertheless, in their prayer for relief, Respondents requested the Arkansas Court of Appeals to "*deny* Appellee's Motion to Dismiss Appeal or Affirm Judgment and [to grant] the RTC and Madison Financial . . . such other and further

relief to which it may show itself entitled." *Id.* at 33a. Thus, on its face, Respondents' response to Ward's motion to dismiss the appeal specifically requested the state appellate court to assume subject matter jurisdiction over the proceeding for purposes of deciding that motion *on the merits.*

On October 25, 1989, the Arkansas Court of Appeals did precisely what Respondents had requested it to do: The court reached and decided *on the merits* Ward's motion to dismiss the appeal. In doing so, the state appellate court unquestionably *considered* and *rejected* Respondents' argument that it had been divested of subject matter jurisdiction by the removal of the proceeding to the district court.*

---

* The Arkansas Court of Appeals undoubtedly took careful note of the fact that it was Respondents, *the removing parties,* who had: (a) *voluntarily returned* to state court after removing the appeal to the District Court; (b) reinvoked its jurisdiction by petitioning it to release the original record; and (c) filed a response to Ward's subsequent motion to dismiss the appeal that requested it to assume jurisdiction over the case for purposes of deciding that motion.

As this Court first noted over a century ago, the federal removal statutes do *not* contemplate that the removing party can "experiment" on his case in state court and, upon an adverse decision, seek refuge in federal court:

> Further to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on its case in the state court, and, upon an adverse decision, then transfer it to the federal court. Here Rosenthal . . . has experimented with the state court and been beaten, and now seeks a different forum.

Rosenthal v. Coates, 148 U.S. 142, 147-48, 13 S.Ct. 576, 577, 37 L.Ed. 399 (1892). Because Respondents voluntarily returned to the Arkansas Court of Appeals to "experiment" on their case, they waived their federal forum.

Second, Respondents' statement of the case and argument leave a crucially important chapter in the procedural history of this case untold and unaddressed. On October 31, 1989, the District Court denied Respondents' emergency motion for an injunction vacating the Arkansas Court of Appeals' October 25, 1989 mandate dismissing the appeal. Pet. App. 44a-51a. Incredibly, thirteen days later, Respondents again *voluntarily returned* to the Arkansas Court of Appeals and again invoked that court's jurisdiction by filing a pleading captioned: "Petition For Rehearing And For Recall Of Mandate Or, In The Alternative, Motion For Reconsideration." *Id.* at 52a-59. This petition was devoted entirely to arguing that the Arkansas Court of Appeals should reconsider the issue of its subject matter jurisdiction and recall the mandate dismissing the appeal. Ward filed a response arguing that the state court had properly adjudicated the issue of its subject matter jurisdiction. *Id.* at 60a-69a.

On November 29, 1989, after fully and fairly considering *for the second time* the question of its subject matter jurisdiction, the Arkansas Court of Appeals entered an order denying Respondents' motion to recall the mandate or to reconsider its resolution of the jurisdictional issue. *Id.* at 70a-71a. In short, while reasonable minds might disagree on whether the Arkansas Court of Appeals "correctly" adjudicated the issue of its subject matter jurisdiction, there can be *no dispute* concerning its full and fair adjudication of that issue.

The Eighth Circuit's *res judicata* analysis focused exclusively on whether the Arkansas Court of Appeals had "correctly" adjudicated the issue of its subject matter jurisdiction. As a result, the Eighth Circuit cited 28 U.S.C. 1446(d) to end, rather than to begin, its inquiry into whether Respondents' voluntary post-removal conduct before the Arkansas Court of Appeals resulted in a full and fair adjudication of the jurisdictional issue in the state court forum. *Id.* at 4a. Because the Eighth Circuit's

refusal to give *res judicata* effect to the Arkansas Court of Appeals' final mandate undercuts the very foundation of that critically important doctrine, conflicts with a long line of decisions by this Court, and makes a mockery of full faith and credit and considerations of comity between state and federal courts, this error warrants the Court granting plenary review.

II.

To escape this Court's holdings in *Moitie, Ackermann, Angel,* and *Reed,* Respondents make the formalistic argument that those cases have no application because Respondents did not initiate a "new action" in the District Court after the Arkansas Court of Appeals entered its October 25, 1989 mandate. This Court, in applying that aspect of the doctrine of *res judicata* which requires the exhaustion of direct appellate remedies, repeatedly has rejected similar arguments aimed at elevating form over substance.

Respondents unquestionably abandoned all of their direct state and federal remedies for challenging the merits of the Arkansas Court of Appeals' October 25, 1989 mandate. As a result, Respondents allowed that mandate and Ward's underlying fully satisfied state court judgment to become *final.* Nevertheless, on July 11, 1991, some twenty-one months after the entry of the state court mandate, Respondents launched a collateral attack in the District Court, which sought to vacate and set aside both the state court mandate and Ward's now final, fully satisfied state court judgment. This clearly constituted an attempt by Respondents to relitigate in a *new proceeding* and *different forum* issues which they had lost in the earlier and now finally concluded proceeding before the Arkansas Court of Appeals. Since this Court has specifically proscribed such conduct in the foregoing line of cases, plenary review is required to close the Eighth

Circuit's novel "collateral attack" exception to the doctrine of *res judicata*.

III.

Notwithstanding Respondents' best efforts, it simply is impossible to reconcile the muddle of conflicting decisions by state and federal appellate courts on the circumstances under which the RTC can assert its *D'Oench* and Section 1823(e) defenses for the first time in a post-judgment appeal. This situation will continue to worsen until the Court addresses that issue and provides badly needed guidance on what has become, in the words of one appellate court, "the dungeon of *Duhme*." *Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990). The Court should grant plenary review so that the compelling facts in this case can be used as the basis for providing that guidance.

CONCLUSION

The petition for writ of certiorari should be granted on all questions presented for review.

Respectfully submitted,

THOMAS RAY
SHULTS, RAY & KURRUS
200 West Capitol, Suite 1600
Little Rock, Arkansas 72201-3637
(501) 375-2301

Counsel for Petitioners

February 15, 1993